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# Understanding Aboriginal Rights

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# UNDERSTANDING ABORIGINAL RIGHTS

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Toronto

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*The entrenchment of aboriginal rights in the Constitution Act, 1982 and the importance of aboriginal claims now reaching the courts highlight the need to understand these long-ignored rights. This article sets out a general theory of the subject, drawing on the leading cases and the complex history of relations between native peoples and the Crown. Aboriginal rights are based on a set of basic common law principles that operate uniformly across Canada, except where modified by treaty or legislation. Under those principles, native peoples presumptively hold full rights to lands in their possession, and retain their accustomed laws and political institutions, including a measure of internal autonomy. The Crown holds a general fiduciary obligation to protect aboriginal peoples and their lands. Aboriginal rights have long enjoyed some constitutional protection under the Royal Proclamation of 1763 and the Constitution Act, 1867. The recent entrenchment of these rights completes the process.*

*L'inclusion des droits des autochtones dans la Loi constitutionnelle de 1982 et l'importance des revendications autochtones qui arrivent maintenant devant les tribunaux soulignent combien il est nécessaire de comprendre ces droits restés dans l'oubli pendant si longtemps. Dans cet article, l'auteur présente le sujet dans ses grandes lignes en s'appuyant sur les décisions qui font autorité et sur l'histoire complexe des relations entre les peuples autochtones et la Couronne. Les droits autochtones ont pour base un ensemble de principes de common law qui s'appliquent de façon uniforme dans tout le Canada sauf quand un traité ou un acte législatif y ont apporté des changements. En vertu de ces principes, les peuples indigènes ont, de prime abord, tous les droits sur les terres qu'ils possèdent et conservent leur droit coutumier et leurs institutions politiques y compris une certaine autonomie domestique. La Couronne a l'obligation fiduciaire générale de protéger les peuples autochtones et leurs terres. Les droits autochtones reçoivent depuis longtemps une certaine protection constitutionnelle et ceci en vertu de la Proclamation royale de 1763 et de la Loi constitutionnelle de 1867. L'inclusion récente de ces droits dans la Constitution ne fait que parfaire ce développement.*

## Introduction

The subject of aboriginal rights is like an overgrown and poorly excavated archeological site. Most visitors are content to wander around the

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ruins, climb to the top of the highest mound, or poke about in the dust for souvenirs. Others, prompted by curiosity or official duty, select a likely spot and sink a trench through the layers of historical deposits, uncovering, perhaps, the severed foot of a colossal statue, or a worn inscription. But the meaning of these objects is unclear. Even when they can be identified and dated, their larger import escapes us.

It is now a century and more since excavation of this sort got underway in Canada. Some areas have been cleared and a number of curious items retrieved, tagged, and sorted. But we still have only a dim perception of the shape of the city that lies beneath our feet. More surprising, little thought has been given to the matter. When questions arise about the location of the city's boundaries, and the significance of its principal structures, we are referred to confident statements made by early excavators, as if these dispensed with the need for further inquiry.

A number of factors suggest that the era of haphazard excavation is rapidly coming to an end. Section 35 of the Constitution Act, 1982<sup>1</sup> recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada". Likewise, section 25 shields from the impact of the Canadian Charter of Rights and Freedoms<sup>2</sup> a broader group of rights described as "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada", including those recognized by the Royal Proclamation of 1763.<sup>3</sup> These sections require courts to confront many of the basic unresolved issues concerning aboriginal rights.

In an important case the Supreme Court has signalled that it is ready for the task. While not dealing directly with the new constitutional provisions the judgment provides the stimulus and much essential material, for reflection on the fundamental nature and origins of aboriginal rights. The case is *Guerin v. The Queen*.<sup>4</sup> The occasion was an action by the Musqueam Indian band of British Columbia against the federal government. The band possessed valuable reserve lands in the City of Vancouver. They alleged that in 1957 the government induced them to surrender part of their reserve to the Crown for leasing to a golf club, with the rent to be applied to the band's account. After obtaining the surrender from the band, the government leased the land to the golf club

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<sup>1</sup> Schedule B of the Canada Act, 1982, c.11 (U.K.).

<sup>2</sup> Part I (ss. 1-34) of the Constitution Act, 1982.

<sup>3</sup> The most accessible text is that found in R.S.C. 1970, App. II, No. 1, but it is not completely accurate. An accurate copy of the original printed text is given in C.S. Brigham (ed.), *British Royal Proclamations Relating to America* (1911), p. 212. The original document, as entered on the Patent Roll for the regnal year 4 Geo. III, may be seen in the United Kingdom Public Record Office: c. 66/3693 (back of roll).

<sup>4</sup> [1984] 2 S.C.R. 335, (1984), 13 D.L.R. (4th) 321 (S.C.C.). For analysis of the decision, see: D.P. Emond, Case Comment: *Guerin v. R.* (1986), 20 *Estates and Trusts*

for seventy-five years on terms much less favourable than the band had agreed to, and did not even give them a copy of the lease until twelve years later. Evidence showed that the lands were potentially among the most valuable in Vancouver and could have commanded a much higher rent. The band argued that the government was guilty of a breach of trust, and asked for damages.

The government argued in reply that it was not legally responsible to the band for what it did with their lands after the surrender. In effect, it might have leased the lands on whatever terms it saw fit, regardless of what it had told the band earlier. The government's only responsibility to the band was political rather than legal.

The Supreme Court unanimously rejected the government's arguments and held it legally accountable for its actions, awarding the band ten million dollars in damages. Dickson J., speaking for himself and Beetz, Chouinard and Lamer JJ., based his decision squarely on the concept of aboriginal land rights. He held that aboriginal land title is a legal right derived from the native peoples' historic occupation of their tribal lands. That title both pre-dated and survived the claims to sovereignty made by European nations in colonizing North America. Although aboriginal title was recognized in the Royal Proclamation of 1763, it has an independent basis in Canadian common law. It entitles native peoples to possess their homelands, until their title is extinguished by a voluntary surrender to the Crown or by legislation. Native peoples have a special relationship with the Crown, whereby the Crown serves as an intermediary between them and people wishing to purchase or lease their lands. This relationship gives rise to a distinctive fiduciary obligation on the part of the Crown to deal with surrendered native lands for the benefit of the native peoples. If the Crown fails in the performance of its fiduciary duties it is liable in damages.

A second opinion, coming to similar conclusions, was delivered by Wilson J., with Ritchie and McIntyre JJ. concurring. She emphasizes that the Crown has a general fiduciary obligation to protect Indian rights in their reserves, which is rooted in the concept of aboriginal title. The last of the eight judges participating in the decision, Estey J., gave a short separate opinion concurring in the result, but invoking the law of agency.<sup>5</sup>

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Reports 61; J. Hurley, *The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen* (1985), 30 McGill Law J. 559; W.R. McMurtry and A. Pratt, *Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective*, [1986] 3 C.N.L.R. 19; J.I. Reynolds and L.F. Harvey, *The Fiduciary Obligation of the United States and Canadian Governments towards Indian Peoples*, in *Indians and the Law II*, Chapter 1, Materials prepared for Continuing Legal Education, Vancouver, B.C., January and March, 1985.

<sup>5</sup> The ninth member of the bench, Laskin C.J.C., took no part in the judgment.

The decision has a profound significance for aboriginal land claims. In the Prairie Provinces, most of Ontario, and part of the Northwest Territories, Indian peoples were induced to sign treaties whose written terms provide for the surrender of their lands to the Crown. No such treaties were signed for the Atlantic Provinces, Quebec, much of British Columbia, and large sectors of the North.<sup>6</sup> In Quebec, native land claims were partially settled by the James Bay Agreement in the mid-1970s.<sup>7</sup> But in many other parts of Canada native people maintain that their rights to their traditional homelands have never been lawfully extinguished by treaty or by statute.<sup>8</sup> In areas where treaties were signed, it is disputed whether the written texts faithfully reflect the oral terms of the agreements.

The federal government has acknowledged that certain native peoples have continuing interests in traditional lands founded on use and occupancy, and has been prepared to negotiate some aboriginal land claims on that basis. But it has remained equivocal about the legal merits of these claims.<sup>9</sup> Provincial governments, whose control over natural resources is affected, have generally been more reluctant than the federal government to acknowledge the existence of aboriginal title or to negotiate claims based on it.

Prior to the *Guerin* decision, the jurisprudence on aboriginal title had been unclear. In *Calder v. Attorney-General of British Columbia*,<sup>10</sup>

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<sup>6</sup> The subject is considered in: B.H. Wildsmith, Pre-Confederation Treaties, in B.W. Morse (ed.), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (1985), pp. 122-271; N.K. Zlotkin, Post-Confederation Treaties, *ibid.*, pp. 272-407.

<sup>7</sup> The James Bay and Northern Quebec Agreement (Quebec: Éditeur officiel du Québec, 1976); embodied in S.C. 1976-77 c.32, and S.Q. 1976 c.46. See: W. Moss, *The Implementation of the James Bay and Northern Quebec Agreement*, in Morse, *op. cit.*, footnote 6, pp. 684-694.

<sup>8</sup> For general accounts, see: D. Sanders, *Prior Claims: Aboriginal People in the Constitution of Canada*, in S.M. Beck and I. Bernier (eds.), *Canada and the New Constitution*, Vol. I (1983), pp. 225-279; P.A. Cumming, *Canada's North and Native Rights*, in Morse, *op. cit.*, footnote 6, pp. 695-744; B.W. Morse, *The Resolution of Land Claims*, in Morse, *op. cit.*, footnote 6, pp. 617-683; M. Boldt and J.A. Long (eds.), *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (1985); P.A. Cumming and N.H. Mickenberg (eds.), *Native Rights in Canada* (2nd ed., 1972).

<sup>9</sup> See: Canada, Department of Indian Affairs and Northern Development, *In All Fairness: A Native Claims Policy. Comprehensive Claims* (1981), which states at pp. 11-12: "Because of historical reasons—continuing use and occupancy of traditional lands—there were areas in which Native people clearly still had aboriginal interests. Furthermore these interests had not been dealt with by treaty nor did any specific legislation exist that took precedence over these interests. . . . [Under the federal government's 1973 policy statement] the federal government was prepared to accept land claims based on traditional use and occupancy and. . . *although any acceptance of such a claim would not be an admission of legal liability*, the federal government was willing to negotiate settlements of such claims." (Emphasis added).

<sup>10</sup> [1973] S.C.R. 313, (1973), 34 D.L.R. (3d) 145. For discussion of the case, see

decided in 1973, the Supreme Court of Canada split on the question whether the Nishga people of British Columbia possessed aboriginal rights to their traditional lands in the Nass River Valley. Hall J., Spence and Laskin JJ. concurring, held that the Nishgas had a legally recognizable title that had not been extinguished at the coming of the British Crown or by subsequent legislation. Judson J., Martland and Ritchie JJ. concurring, seemed to accept that the Nishgas originally had some sort of aboriginal rights to their lands, but held that those rights had been terminated by British Columbia legislation before Confederation. The seventh member of the court, Pigeon J., expressed no opinion on these points and held against the Nishgas on a procedural ground. Although the decision as a whole supported the concept of aboriginal title, the ambiguity of Judson J.'s judgment left room for argument.

The *Guerin* decision ends this aspect of the controversy, with seven of the eight judges holding that aboriginal title is a legal right that can be extinguished only by native consent or by legislation.<sup>11</sup> The effect is to shift the burden of proof to federal and provincial governments. They must now show that aboriginal land rights were lawfully extinguished in the past or acknowledge their continuing existence.<sup>12</sup> Where the rights were wiped out by legislation, the decision implies that compensation should have been paid.<sup>13</sup>

Another important effect of the decision is to suggest that the Crown has a general trust-like obligation toward native peoples.<sup>14</sup> This ruling has implications in a number of areas. It provides a standard for the interpretation of treaty promises made by the Crown to Indian peoples, and also for interpreting legislation that affects native rights. At the least, it opens the door to actions alleging improper Crown dealings with reserve lands.

Most important, however, is the fact that in *Guerin* the Supreme Court shows a willingness to consider the topic of aboriginal rights afresh, and to initiate a dialogue concerning the broad principles that alone can make sense of the subject.<sup>15</sup> The initiative comes none too soon, for courts are increasingly being faced with large and complex aboriginal claims. The absence of clear guiding principles has made it exception-

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K.M. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder* (1973), 51 Can. Bar Rev. 450; D. Sanders, *The Nishga Case* (1973), B.C. Studies (no. 19) 3.

<sup>11</sup> See discussion below at footnotes 70-79.

<sup>12</sup> *Infra*, at footnote 131.

<sup>13</sup> *Infra*, at footnotes 91-104.

<sup>14</sup> *Infra*, at footnotes 105-116.

<sup>15</sup> The same attitude permeates the Supreme Court's recent decision regarding treaty rights in *Simon v. The Queen*, [1985] 2 S.C.R. 387, (1985), 24 D.L.R. (4th) 390.

ally difficult for trial courts to cope with the voluminous body of historical and anthropological evidence that often characterizes such claims, and the judgments show the strain.<sup>16</sup>

This article represents a contribution to the dialogue that *Guerin* initiates. My aim is to outline a general theory of aboriginal rights that embraces the decision's main holdings and relates them to a broader series of questions. The theory draws on the leading Canadian cases on the subject, and to a limited extent on American jurisprudence. But it is not founded exclusively on precedent. It looks beyond the confines of the cases to the larger historical processes they reflect. The goal, then, is to provide a map for understanding what aboriginal rights are all about.

I will discuss first the sources and status of the doctrine of aboriginal rights. I will then focus specifically on aboriginal title to land, reviewing its main characteristics, and in particular, the ways it may be gained and lost. The links between aboriginal lands and Reserves will then be briefly explored. Finally, I will discuss the question of legislative jurisdiction over aboriginal rights, and the constitutional provisions protecting them from governmental intrusion.

### I. *Roots*

The doctrine of aboriginal rights is a basic principle of Canadian common law<sup>17</sup> that defines the constitutional links between the Crown and aboriginal peoples<sup>18</sup> and regulates the interplay between Canadian systems of law and government (based on English and French law) and native land rights, customary laws, and political institutions. It states the original terms upon which the Crown assumed sovereignty over native peoples and their territories. The factual process by which this occurred is sometimes misunderstood, and so I will briefly review it before considering its legal dimensions.

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<sup>16</sup> Witness the courts' struggles in such cases as *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518 (F.C.T.D.), and *Attorney-General for Ontario v. Bear Island Foundation* (1984), 15 D.L.R. (4th) 321 (Ont. H.C.).

<sup>17</sup> By Canadian common law, I mean simply the unwritten law applied by Canadian courts, whether in "common law" or "civil law" jurisdictions. I do not mean English common law, as received in certain parts of Canada. Nor do I mean the common law as opposed to equity. In certain spheres (notably that of aboriginal rights), Canadian common law operates uniformly across the country, regardless of whether the law of the particular jurisdiction is based on French law or English law.

<sup>18</sup> I will use the phrase "aboriginal peoples", "native peoples", and "Indian peoples" interchangeably. The term "Indian", of course, has a narrower meaning in popular usage, but in Canadian legal usage has been employed to refer to Inuit and Metis peoples, as well as "Indians" in the narrow sense. See references in footnote 175 below.

### A. *The Coming of the Crown*<sup>19</sup>

Most native Canadian peoples were never conquered by the Crown. From the early days of colonization, Great Britain and France advanced claims to broad swathes of American territory, and offered to protect the native inhabitants against the imperial designs of other European powers and the uncontrolled inroads of settlers, traders, miners, and speculators. Initially, these claims were not backed by serious efforts to conquer or govern the lands in question, and were ignored by most Indians, who were well able to defend themselves.<sup>20</sup>

Small colonies of French and English settlers sprang up along the eastern coasts of America, and extensive webs of relations developed with near and distant Indian groups, until the whole of the eastern and northern continent was affected.<sup>21</sup> In early times, these relations were usually conducted on a basis of rough equality. They generally took the shape of formal oral treaties dealing with matters of trade and alliance, war and peace, the cession of lands and the drawing of boundaries, reparation for past wrongs and promises of right-doing in future.<sup>22</sup> They

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<sup>19</sup> See generally: J.T. Juricek, *English Claims in North America to 1660: A Study in Legal and Constitutional History* (Doctoral Dissertation, University of Chicago, 1970); B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (D. Phil. Thesis, Oxford University, Faculty of Law, 1979; reprinted, University of Saskatchewan Native Law Centre, 1979); J. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Doctoral Dissertation, Cambridge University, 1985); G.S. Lester, *The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument* (Doctoral Dissertation, Osgoode Hall Law School, York University, 1981); J. Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Department of Indian and Northern Affairs, 1981); P.C. Williams, *The Chain* (LL.M. Dissertation, Osgoode Hall Law School, York University, 1982).

<sup>20</sup> For a detailed review, see Hurley, *op. cit.*, footnote 19; Slattery, *op. cit.*, footnote 19, pp. 95-125.

<sup>21</sup> Among numerous works, the following deserve particular mention: A.G. Bailey, *The Conflict of European and Eastern Algonkian Cultures, 1504-1700: A Study in Canadian Civilization* (2nd ed., 1969); L.H. Gipson, *The British Empire Before the American Revolution*, 15 vols. (1936-1970); C.J. Jaenen, *Friend and Foe: Aspects of French-Amerindian Cultural Contact in the Sixteenth and Seventeenth Centuries* (1976); F. Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (1975); F. Jennings, *The Ambiguous Iroquois Empire* (1984); R.O. MacFarlane, *Indian Relations in New England, 1620-1760: A Study of a Regulated Frontier* (Doctoral Dissertation, Harvard University, 1933); W.S. Robinson, *Indian Policy of Colonial Virginia* (Doctoral Dissertation, University of Virginia, 1950); A.W. Trelease, *Indian Affairs in Colonial New York: The Seventeenth Century* (1960); B. Trigger, *The French Presence in Huronia: The Structure of Franco-Huron Relations in the First Half of the Seventeenth Century* (1968), 49 *Canadian Historical Review* 107.

<sup>22</sup> Many of these are reproduced in standard printed collections of colonial documents, such as E.B. O'Callaghan (ed.), *Documents Relative to the Colonial History of the State of New York*, 11 vols. (1856-1861).



were strongly influenced by Indian concepts and ceremonial, and were often renewed in annual sessions.<sup>23</sup>

Britain eventually outflanked its imperial rivals. A long series of wars with France and Spain led to treaty settlements that recognized some of Britain's existing claims and purported to add further territories to its domains.<sup>24</sup> Some of these treaties succeeded in restraining European rivals from meddling in the areas designated, leaving Britain free to trade and colonize there without outside interference. Others were just a prelude to further controversy and conflict. Finally, at the Treaty of Paris in 1763, France withdrew completely from the area now comprising Canada, allowing Britain a free hand. Indian peoples did not sign this Treaty or its predecessors, and did not concede that European states had the power to sign for them.<sup>25</sup>

Native Canadians could not, however, remain immune forever to European domination. Over several centuries, and after long periods of alliance and trade, they succumbed piecemeal to the Crown's pressure to accept its authority, usually only when their economic fortunes and military capacity had waned, and in the shadow of the growing power of the settler communities.<sup>26</sup> The pattern differed from area to area, but generally the government gained control only in the nineteenth or twentieth centuries. In some cases, Indian groups signed formal treaties ostensibly acknowledging the Crown's sovereignty, receiving in return assurances of protection.<sup>27</sup> In others, the process was more informal and haphazard, and was accompanied by varying degrees of native resistance and protest. Even today, significant opposition to the legitimacy of the Crown's rule has continued among native groups.

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<sup>23</sup> See, in particular, Williams, *op. cit.*, footnote 19, pp. 31-68.

<sup>24</sup> Notably, the Treaty of Utrecht (1713) and the Treaty of Paris (1763). For detailed discussion of these and other treaties, see Slattery, *op. cit.*, footnote 19, pp. 126-190; M. Savelle, *The Origins of American Diplomacy: The International History of Angloamerica, 1492-1763* (1967); M. Savelle, *The Diplomatic History of the Canadian Boundary, 1749-1763* (1940).

<sup>25</sup> See, D.V. Jones, *License for Empire: Colonialism by Treaty in Early America* (1982).

<sup>26</sup> For illuminating accounts of this process, see, *inter alia*: R. Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (1977); R. Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (1973); L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (1979).

<sup>27</sup> No complete printed collection of these treaties exists. Useful sources include: A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880); Canada, *Indian Treaties and Surrenders*, 3 vols. (1905-1912); W.D. Hamilton and W.A. Spray (eds.), *Source Materials Relating to the New Brunswick Indian* (1976). The written texts of these treaties must be read with a critical eye. Usually, they were accompanied by extensive oral exchanges, which may have constituted the

## B. *The Legal Effects of Crown Claims*

What legal impact did the Crown's penetration of North America have on Indian peoples? Two basic issues arise. The first is this. Were the Crown's initial claims, coupled with acts of "discovery" and treaties with other European states, legally sufficient to bring native groups and their territories under the Crown's sovereignty, regardless of the degree of factual control achieved? Or did the Crown obtain sovereignty over native peoples only at later stages, when they actually submitted to its authority?

The second issue springs from the first. Assuming that the Crown did, in some way or other, gain sovereignty over native Canadian peoples, how did this event affect their legal position? What happened to their laws, property rights, and political institutions? Did these disappear overnight, to be replaced by a new set of rights and rules? Or did they survive the transition basically intact, or in some modified but recognizable form?

Most of this article will be taken up with the second of the two issues, which is really a nest of distinct but related questions. The first issue has complex historical and theoretical dimensions that cannot be fully explored here. Both issues are, of course, legal, and cannot be resolved simply by looking at the facts. Rules are needed to determine which facts are relevant and to assess their significance. At least three legal systems are available for the task: international law, the domestic law of the claimant European state, and the domestic law of the native people whose lands are claimed. The resolution of the issues depends in part on which system is chosen as an initial vantage point. In this article, we will adopt the perspective of a Canadian court, rather than a disinterested international tribunal or a native society. Our focus, then, will be on the position in Canadian law, leaving the other perspectives to be explored on another occasion.

The first issue may be disposed of briefly. Canadian law treats the question of when and how the Crown gained sovereignty over Canadian territories in a somewhat artificial and self-serving manner. To state a complex matter simply, the courts apparently feel bound to defer to official territorial claims advanced by the Crown, without inquiring into the facts supporting them or their validity in international law.<sup>28</sup> This judicial posture of deference is designed to leave the executive with a relatively free hand in matters of foreign policy. So a Canadian court will ordinarily recognize historical claims officially advanced by the Crown

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true agreement. The written version was translated orally to the Indians in a process that allowed ample opportunity for misunderstanding and distortion.

<sup>28</sup> Nevertheless, a court might well take international law into account in interpreting Crown claims, so as to harmonize the two as far as possible. For discussion and authorities, see Slattery, *op. cit.*, footnote 19, pp. 63-65.

to American territories as effective to confer sovereignty for domestic purposes.

The question to be answered in the Canadian context, then, is how much territory the Crown claimed at various stages, and for what purposes. This is a complex question, requiring a detailed and balanced reading of the historical record, one that is sensitive to the vagaries of state policy and ambition, and takes account of the Crown's dealings not only with other European powers, but also with native peoples. It is not enough to found the acquisition of the continent on some bit of puffery in an ancient Charter. Claims advanced in one era were quietly retracted or modified in another. What was convenient to assert in dealings with other European powers was often prudent to deny in negotiations with Indian groups, and *vice versa*. To determine the date, then, when the Crown unequivocally asserted sovereignty over a given sector of Canada requires a detailed analysis of the evidence pertinent to that area.

Given that the Crown *at some stage* asserted sovereignty over native Canadian groups, what effect did this have on their laws, land rights, and political institutions, as seen from the perspective of a Canadian court? This is the second of the two questions identified earlier, and it is the one that will claim our attention throughout the remainder of this paper. A brief summary of our response may be given here.<sup>29</sup>

A review of the Crown's historical relations with aboriginal peoples supports the conclusion that the Crown, in offering its protection to such peoples, accepted that they would retain their lands, as well as their political and cultural institutions and customary laws, unless the terms of treaties ruled this out or legislation was enacted to the contrary. Native groups would retain a measure of internal autonomy, allowing them to govern their own affairs as they found convenient, subject to the overriding authority of the Crown in Parliament. The Crown assumed a general obligation to protect aboriginal peoples and their lands and generally to look out for their best interests—what the judges have described as a fiduciary or trust-like obligation. In return, native peoples were required to maintain allegiance to the Crown, to abide by her laws, and to keep the peace.

### C. *The Common Law Doctrine of Aboriginal Rights*<sup>30</sup>

The Crown's historical dealings with Indian peoples were based on legal principles suggested by the actual circumstances of life in North

<sup>29</sup> The matter is considered in detail in Slattery, *op. cit.*, footnote 19, pp. 10-62; B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (University of Saskatchewan Native Law Centre, 1983). Compare with Lester, *op. cit.*, footnote 19; G.S. Lester, *Inuit Territorial Rights in the Canadian Northwest Territories: A Survey of Legal Problems* (Ottawa: Tungavik Federation of Nunavut, 1984).

<sup>30</sup> See, generally: J. Hurley, *Aboriginal Rights, the Constitution and the Marshall*

America, the attitudes and practices of Indian societies, broad rules of equity and convenience, and imperial policy. These principles gradually crystallized as part of the special branch of British law that governed the Crown's relations with its overseas dominions, commonly termed "colonial law", or more accurately "imperial constitutional law".<sup>31</sup>

The legal principles concerning aboriginal peoples developed at the same time as other basic doctrines of colonial law and shared essentially the same juridical character. Many of their basic tenets can be discerned as early as the seventeenth century in British practice in the American colonies. They emerge more fully developed during the next century and are reflected, if only partially, in the major Indian document of this era, the Royal Proclamation of 1763.<sup>32</sup> Just as eighteenth century colonial law harboured rules governing such matters as the constitutional status of colonies, the relative powers of the Imperial Parliament and local assemblies, and the reception of English law, it also contained rules concerning the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions. These rules form a body of unwritten law known collectively as the doctrine of aboriginal rights. The part dealing specifically with native lands is called the doctrine of aboriginal title. Other parts deal with such matters as Indian treaties, customary law, powers of self-government, and the fiduciary role of the Crown.

The doctrine of aboriginal rights, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired. In the same way that colonial law determined whether a colony was deemed to the "settled" or "conquered", and whether English law was automatically introduced or local laws retained, it also supplied the presumptive legal structure governing the position of native peoples. The doctrine of aboriginal rights applied, then, to every British colony that now forms part of Canada, from Newfoundland to British Columbia. Although the doctrine was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English

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Court (1982-83), 17 R.J.T. 403; M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984); M. Jackson, *The Articulation of Native Rights in Canadian Law* (1984), 18 U.B.C.L.R. 255.

<sup>31</sup> The point is considered in more detail in Slattery, *op. cit.*, footnote 29, pp. 35-36. The origins and character of colonial law are discussed in B. Slattery, *The Independence of Canada* (1983), 5 Sup. Ct. L.R. 369, at pp. 375-384.

<sup>32</sup> *Supra*, footnote 3. The process by which the common law principles governing aboriginal rights developed is well-described by Strong J. in *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, at pp. 607-616.

common law and governed its application in the colony. Thus, the doctrine of aboriginal rights extended to New France at the time of British conquest, even before English law was introduced in 1763, and was unaffected by the restoration of private French law in the Quebec Act<sup>33</sup> a decade or so later.

Not only does the doctrine of aboriginal rights apply apart from the introduction of English common law, it limits and molds the application of that law to native peoples, just as it limits the application of French law to native people in Quebec. The reason is that the doctrines governing the reception of English law in "settled" colonies, and the retention of local law (such as French law) in "conquered" colonies are themselves part of imperial constitutional law and are to be understood in light of other imperial principles, including the doctrine of aboriginal rights.

This consideration provides the theoretical basis for the survival of native customary law in Canada, a phenomenon long recognized (but not always well understood) in our courts.<sup>34</sup> When the Crown gained sovereignty over an American territory, colonial law dictated that the local customs of the native peoples would presumptively continue in force and be recognizable in the courts, except insofar as they were unconscionable or incompatible with the Crown's assertion of sovereignty. In this respect, the rule resembles that applied in conquered or ceded colonies, where the local law is held to remain in force in the absence of acts to the contrary. But the rule respecting native custom applies regardless of whether the territory is deemed to have been acquired by conquest, cession, peaceful settlement, or in some other way. It may be seen, then, that the doctrine of colonial law that supports the survival of native custom in Canada is distinct from the English rules concerning local custom in England and is governed by quite different considera-

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<sup>33</sup> 14 Geo. III, c.83 (U.K.). It is a matter of debate how far English law was actually introduced in Quebec in 1763, and thus whether the Quebec Act restored or merely confirmed French private law. See Slattery, *op. cit.*, footnote 19, pp. 165-174, 204-210.

<sup>34</sup> See, *Connolly v. Woolrich* (1867), 11 L.C. Jur. 197 (Que. S.C.), (1869), 1 R.L.O.S. 253 (Que. C.A.); *R. v. Nan-e-quis-a Ka* (1889), 1 Terr. L.R. 211 (N.W.T.S.C.); *R. v. Bear's Shin Bone* (1899), 3 C.C.C. 329 (N.W.T.S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T.T.C.); *Re Adoption of Katie* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T.T.C.); *Re Kitchoodlik and Tucktoo* (also reported *sub nom Re Deborah*) (1972), 28 D.L.R. (3d) 483 (N.W.T.C.A.), *aff'd* (1972), 27 D.L.R. (3rd) 225 (N.W.T.T.C.); *Re Wah-Shee* (1975), 57 D.L.R. (3rd) 743 (N.W.T.S.C.); *Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.); N.K. Zlotkin, *Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases*, [1984] 4 C.N.L.R. 1; Slattery, *op. cit.*, footnote 19, pp. 35-44.

tions. The attempt to apply the tests governing custom in the English County of Kent to native customs in the Canadian Northwest Territories is misguided.

From its origins in British imperial law, the doctrine of aboriginal rights has passed into Canadian common law, and, subject to statutory modifications, operates uniformly across Canada.<sup>35</sup> The doctrine was inherited not only by Canada but also by the United States after the American Revolution. A series of decisions written by Chief Justice Marshall of the United States Supreme Court in the early nineteenth century review the history of British dealings with native peoples in America, and articulate certain principles implicit in those dealings.<sup>36</sup> These decisions perform for the doctrine of aboriginal rights what Lord Mansfield's celebrated decision in *Campbell v. Hall*<sup>37</sup> performs for other principles of colonial law, providing structure and coherence to an untidy and diffuse body of customary law based on official practice. The Marshall decisions are as relevant to Canada as they are to the United States, and have often been cited in Canadian courts.<sup>38</sup>

The decision of the Supreme Court of Canada in *Guerin v. The Queen*,<sup>39</sup> testifies to the common law foundations of aboriginal rights. In dealing with such subjects as the existence and nature of aboriginal title, the character of surrenders of native land, and the fiduciary obligations of the Crown toward native peoples, the court treats the question in each case as one of unwritten or common law that is distinctive to Canada

<sup>35</sup> The transformation of colonial legal principles into rules of Canadian common law is examined in Slattery, *loc. cit.*, footnote 31, at pp. 390-392.

<sup>36</sup> See, *Johnson and Graham's Lessee v. McIntosh*, 8 Wheaton 543 (1823); *Cherokee Nation v. State of Georgia*, 5 Peters 1 (1831); *Worcester v. State of Georgia*, 6 Peters 515 (1832). For analysis of these decisions, see, Hurley, *loc. cit.*, footnote 30; Slattery, *op. cit.*, footnote 29, pp. 17-38; H.R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States* (1978), 27 Buffalo L. Rev. 637; J.Y. Henderson, *Unraveling the Riddle of Aboriginal Title* (1977), 5 Amer. Ind. L. Rev. 75. For an excellent historical study, see J.C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality* (1968-69), 21 Stan. L. Rev. 500.

<sup>37</sup> (1774), Lofft 655, 98 E.R. 848; 1 Cowp. 204, 98 E.R. 1045; 20 St. Tr. 239 (K.B.).

<sup>38</sup> To cite only a few examples, the Canadian judges in *St. Catharines Milling and Lumber Co. v. The Queen* place heavy reliance on Marshall J.'s views, albeit with varying results; see (1885), 10 O.R. 196 (Ont. Ch.), per Boyd C., at p. 209; (1886), 13 O.A.R. 148 (Ont. C.A.), per Burton J.A., at p. 160; per Patterson J.A., at p. 169; (1887), 13 S.C.R. 577, per Ritchie C.J., at p. 600, per Strong J., at pp. 608, 610-612, 633-634, per Taschereau J., at p. 642. Both major opinions written in the Supreme Court in the *Calder* case refer to the Marshall decisions (*supra*, footnote 12, per Judson J., at p. 151, per Hall J., at pp. 193-196), as does the opinion of Dickson J. in the *Guerin* case (*supra*, footnote 4, at pp. 335-336).

<sup>39</sup> *Supra*, footnote 4.

and exists independently of statute or executive order. The court clearly assumes that the common law governing these matters is uniform, and does not vary from province to province. There is no suggestion that the law applied by the court was peculiar to the province of British Columbia, where the case arose.

The fact that the common law of aboriginal rights is uniform across Canada means that it is not necessary for many purposes to determine what precise territories are covered by the Indian provisions of the Royal Proclamation of 1763.<sup>40</sup> Even assuming that certain provisions do not apply to some parts of Canada, the common law principles that the Proclamation consolidates are in force there. The fruits of this approach are evident in *Guerin*, where the court treats a rule embodied in the Proclamation as relevant to British Columbia without finding it necessary to determine the document's precise geographical scope.<sup>41</sup>

The *Guerin* decision also stands for the proposition that statutes and other acts concerning native people should be read in the light of the common law of aboriginal rights. In *Guerin*, the court adopts this approach in interpreting the provisions of the Indian Act.<sup>42</sup> By implication, the common law also provides the context for understanding treaties signed with particular Indian bands, as well as such important constitutional provisions as section 91(24) of the Constitution Act, 1867,<sup>43</sup> and sections 25 and 35 of the Constitution Act, 1982.<sup>44</sup>

As a common law doctrine, albeit a fundamental one, the doctrine of aboriginal rights can in principle be overridden or modified by legislation passed by a competent legislature, in the absence of constitutional barriers.<sup>45</sup> It seems doubtful whether Indian peoples initially understood or accepted the principle that legislation could nullify their aboriginal rights without their consent, and inconsistent Crown practice may have

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<sup>40</sup> On the geographical scope of the Proclamation, see Slaterry, *op. cit.*, footnote 19, pp. 175-282; K.M. Narvey, *The Royal Proclamation of 1763. The Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company* (1973-74), 38 Sask. L. Rev. 123.

<sup>41</sup> *Supra*, footnote 4, per Dickson J., at pp. 376-379 (S.C.R.), pp. 334-336 (D.L.R.), per Estey J., at pp. 392 (S.C.R.), 346 (D.L.R.).

<sup>42</sup> *Ibid.*, especially at pp. 383, 384-387 (S.C.R.), 340, 341-342 (D.L.R.), per Dickson J., and at pp. 348-350 (S.C.R.), 356-357 (D.L.R.), per Wilson J.

<sup>43</sup> 30 & 31 Vict., c.3 (U.K.). See discussion, *infra*, at footnotes 174-176, and 188-221.

<sup>44</sup> *Supra*, footnote 1. See *infra*, at footnotes 222-225.

<sup>45</sup> See, *Calder v. Attorney-General of British Columbia*, *supra*, footnote 10, per Judson J., at pp. 333-334 (S.C.R.), 159-160 (D.L.R.), per Hall J., at pp. 401-404 (S.C.R.), 208-210 (D.L.R.); *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.); *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104, at pp. 111-112, 116-117, (1977), 75 D.L.R. (3d) 434, at pp. 439, 443; *Guerin v. The Queen*, *supra*, footnote 4, per Dickson J., at pp. 376-377 (S.C.R.), 335 (D.L.R.).

contributed to the confusion. Nevertheless, the standard British doctrine attributing paramountcy to Acts of Parliament has been applied.<sup>46</sup> The ameliorating factor is that throughout much of Canadian history constitutional provisions have limited the power of local legislatures to affect aboriginal rights.<sup>47</sup>

It is not possible here to consider the full range of doctrines associated with the concept of aboriginal rights. We will concentrate on the best developed of these doctrines, that concerning aboriginal land rights (''aboriginal title''), and deal briefly in this context with the Crown's fiduciary responsibilities.

## II. *Aboriginal Title: General Features*

### A. *Basic Concepts*<sup>48</sup>

From early colonial times, a system arose in North America whereby lands over which the Crown claimed sovereignty were divided into two broad categories: Indian Territories, and lands governed by European-style land systems (''General Lands''). The distinction between these categories is the key to understanding the doctrine of aboriginal land rights.

Prior to the advent of Europeans, most of North America was actually possessed and used by native communities. But the map of aboriginal North America was not completely static. Native peoples migrated in response to such factors as war, epidemic, famine, dwindling game reserves, altered soil conditions, trade, and population pressure. Lands that were vacant at one period might later be occupied, and boundaries between groups shifted over time. The identities of the groups themselves changed, as weaker ones withered or were absorbed by others, and new ones emerged.<sup>49</sup>

Far from ending this fluidity, the coming of Europeans in some cases increased it, as novel trade opportunities, technologies, and means of transport upset existing alliances and balances of power and stimulated fresh forms of competition and conflict.<sup>50</sup> The introduction of the horse

<sup>46</sup> The genesis of the principle of Parliamentary supremacy as applied to British colonies is considered in Slattery, *loc. cit.*, footnote 31, at pp. 384-390.

<sup>47</sup> See, *infra*, at footnotes 181-225.

<sup>48</sup> See generally, J.C. Smith, *The Concept of Native Title* (1974), 24 U.T. Law J. 1; Lysyk, *loc. cit.*, footnote 10; Cumming and Mickenberg, *op. cit.*, footnote 8; Slattery, *op. cit.*, footnote 29; Lester, *op. cit.*, footnote 19; G. LaForest, *Natural Resources and Public Property under the Canadian Constitution* (1969), pp. 108-133; D.W. Elliott, *Aboriginal Title*, in Morse, *op. cit.*, footnote 6, pp. 48-121.

<sup>49</sup> See, for example, D.G. Mandelbaum, *The Plains Cree: An Ethnographic, Historical, and Comparative Study* (1979), pp. 7-46.

<sup>50</sup> Mandelbaum, *ibid.*; H. Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (1983), pp. 22-23.



and fire-arms to the western plains gave rise to new and more mobile styles of life among the Western Indians, which ironically are often taken to exemplify traditional Indian culture. The well-known wars of the Iroquois against their aboriginal neighbours in the seventeenth century were related to the European fur trade.<sup>51</sup>

If European influence did not in fact stabilize native boundaries, the Crown's assertion of sovereignty did not in law confine native peoples to the lands they happened to possess at that time and prevent them from acquiring title to new lands in the future. The Indian Territories remained as before, an area open to movement and change, where the land rights of a native group rested on possession, and title was gained by appropriation or agreement and lost by abandonment.

But the Crown's claim of sovereignty over the Indian Territories had one significant legal consequence: under British law, the Crown gained ultimate title to the soil. This flowed from the feudal character of the British constitution, whereby the Crown was not only sovereign but also ultimate landlord. Once a British court recognized the assertion of sovereignty, it also attributed to the Crown a notional title to the lands claimed.<sup>52</sup>

For most practical purposes the Crown's underlying title to the Indian Territories did not affect native property rights, which were viewed as burdens on that title.<sup>53</sup> Neither did it affect customary native systems of land use and tenure, which remained in force within the native communities and governed the relations of their members *inter se*. Its main consequence was that native peoples could not cede their territories to European states other than Britain, for to do so would have involved a denial of the Crown's sovereign rights. Nevertheless, native peoples were not barred from transferring lands among themselves (where native custom allowed this), and their ability to gain rights to new lands within the Indian Territories by simple appropriation was unimpaired.

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<sup>51</sup> See, for example, G.T. Hunt, *The Wars of the Iroquois: A Study in Intertribal Trade Relations* (1960).

<sup>52</sup> See, *Johnson and Graham's Lessee v. McIntosh*, *supra*, footnote 36; *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399, at p. 407 (P.C.); *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.) (lower court decisions reported *sub. nom. St. Catherine's Milling and Lumber Co. v. The Queen*, *supra*, footnote 38). For analysis, see, Slattery, *op. cit.*, footnote 19, pp. 45-62; Slattery, *op. cit.*, footnote 29, pp. 17-43; K.O. Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp. 625-636; J.W. Salmond, *Jurisprudence* (7th ed., 1924) (last edition edited by Salmond), App. V, p. 554; D.P. O'Connell, *International Law* (2nd ed., 1970), Vol. I, pp. 403-405.

<sup>53</sup> The account that follows represents a distillation of the principles laid down by Chief Justice Marshall in *Johnson v. McIntosh*, *supra*, footnote 36, as approved, most recently, in *Guerin*, *supra*, footnote 4, per Dickson J., at pp. 376-379 (S.C.R.), 335-336 (D.L.R.). For detailed analysis of the principles, see Slattery, *op. cit.*, footnote 29, and Slattery, *op. cit.*, footnote 19, pp. 350-361.

Further restrictions on transfers of native lands rose from another source. When colonies of Europeans were established in America, European-derived land systems were introduced among the settlers. These systems had one common characteristic. They were based on the premise that title to land in the colony, so far as the settlers were concerned, could only be derived from Crown grant. Title to land was thus in principle derivative. It followed that private settlers could not acquire title to land simply by taking possession of it; neither could they gain title by purchase from the Indians. This principle served several important purposes. It ensured that the Crown and its deputies retained control over the pace and manner in which land was settled, and that they benefitted from revenues flowing from land grants. It also helped to avoid friction between settlers and Indians caused by the fraudulent practices that often tainted private purchases of Indian lands.

The ban on cession of native lands to outside European states, coupled with the incapacity of settlers to gain title by Indian purchases, resulted in the characterization of native title as inalienable except to the Crown. It can be seen, however, that the inalienability of native title applied only to dealings between Indians and non-Indians; it did not prevent Indians from transferring lands among themselves. Moreover, it did not reflect any inherent infirmity in native title. The doctrine of inalienability was more the product of the derivative systems of title governing the settlers than of any characteristics of native tenure.<sup>54</sup>

Thus, North American lands claimed by the Crown were initially of two types. First, there were the Indian Territories, where the Crown held the ultimate title and an exclusive right of purchase, and the native peoples held rights of possession and the capacity to acquire new lands by appropriation or agreement *inter se*. Second, there were the lands that had been withdrawn from the Indian Territories and made available for settlement ("General Lands"). Such lands were governed by European-style land systems under which title was in principle derived from Crown grant. The Crown could of course grant them to native groups and individuals, as to anyone else. But native groups could no longer freely appropriate them.

These two categories of lands, "Indian Territories" and "General Lands", were at an early stage supplemented by a third category: "Indian Reserves". An Indian Reserve, in the sense used here, is land that has become permanently attached to a particular group of native people. Unlike lands in the Indian Territories, an Indian Reserve cannot be lost

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<sup>54</sup> It may also have been true that under certain native customary systems the sale or transfer of land outside the group was unknown or forbidden. To this extent, the restriction on alienation to private persons coincides with traditional concepts. But these customs are not the source of the common law rule. They would, of course, have also ruled out sales of native lands to the Crown, which is a central feature of the doctrine of aboriginal title.

by its title-holders simply by non-occupation or gained by another native group simply by appropriation. By contrast with General Lands, an Indian Reserve is governed by a *sui generis* body of rules similar to that governing aboriginal title.<sup>55</sup>

Lands held by native peoples in the Indian Territories are the central case of "aboriginal lands", and the common law rights to such lands constitute "aboriginal title" in its fullest sense. Virtually all aboriginal lands in Canada, however, have at some stage been the subject of proclamations, statutory provisions, treaties, or other acts. So long as these acts do not extinguish aboriginal title, the common law remains the foundation of a native group's possessory rights and the land's status as aboriginal land is not fundamentally affected. In Canada, there is no difference in principle between "recognized" and "unrecognized" aboriginal title, such as exists in the United States. I return to this point later.<sup>56</sup>

Aboriginal title can also exist in a modified or attenuated form. For example, in ceding their aboriginal lands to the Crown, native groups have often retained the right to hunt, fish and trap in the ceded area, subject to certain conditions. These rights are best understood as residual portions of the bundle of rights that constitutes aboriginal title. They are thus *sui generis* property rights, similar but not identical to the *profit à prendre* known to English law.<sup>57</sup>

### B. *Aboriginal Title and Customary Land Rights*

The doctrine of aboriginal land rights does not originate in English or French property law, and it does not stem from native custom. It is

<sup>55</sup> The definition of Reserves given here reflects the position at common law, and is not intended to correspond to the various statutory definitions given of Reserves. For discussion, see below at footnotes 165-171.

<sup>56</sup> See below, at footnotes 93-104; and see Dickson J. in *Guerin*, *supra*, footnote 4, at pp. 379 (S.C.R.), 336-337 (D.L.R.): "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney General for Quebec v. Attorney General for Canada* [1921] 1 A.C. 401, at pp. 410-411 (the *Star Chrome* case)." And for discussion of the distinction between "recognized" and "unrecognized" Indian title in American law, see, F.S. Cohen, *Handbook of Federal Indian Law* (1982 ed.), pp. 471-499; D.G. Kelly, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial* (1975), 75 Col. Law Rev. 655.

<sup>57</sup> See K.M. Lysyk, *The Unique Constitutional Position of the Canadian Indian* (1967), 45 Can. Bar Rev. 513, at pp. 518-519; A. Jordan, *Government, Two — Indians, One* (1978), 16 Osg. Hall L.J. 709, at pp. 718-719. The issue whether a native hunting right is a personal right or an interest in land was left open by the Supreme Court of Canada in *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 315, (1985), 23 D.L.R. (4th) 33, at p. 51. In *Bolton v. Forest Pest Management Institute* (1985), 21 D.L.R. (4th) 242, at pp. 248-249 (B.C.C.A.), it was held that a registered trapline may constitute a *profit à prendre*.

an autonomous body of law that bridges the gulf between native systems of tenure and the European property systems applying in the settler communities. It overarches and embraces these systems, without forming part of them.<sup>58</sup> As Dickson J. recognizes in the *Guerin* case, aboriginal land rights are thus *sui generis*.<sup>59</sup>

What role, then, does native custom play in this scheme? The answer lies in the fact that, while the doctrine of aboriginal land rights governs the title of a native group considered as a collective unit, it does not regulate the rights of group members among themselves. Subject, always, to valid legislation, the latter are governed by rules peculiar to the group, as laid down by custom or internal governmental organs.

Thus, the doctrine of aboriginal land rights attributes to native groups a collective title with certain general features. The character of this collective title is not governed by traditional notions or practices, and so does not vary from group to group. However, the rights of individuals and other entities within the group are determined *inter se*, not by the doctrine of aboriginal title, but by internal rules founded on custom. These rules dictate the extent to which any individual, family, lineage, or other sub-group has rights to possess and use lands and resources vested in the entire group.<sup>60</sup> The rules have a customary base, but they are not for that reason necessarily static.<sup>61</sup> Except to the extent they may be otherwise regulated by statute, they are open to both formal and informal change, in accordance with shifting group attitudes, needs, and practices.

These considerations explain why it is possible for a native group to hold aboriginal title to lands at common law even if it has no traditional notions of private land ownership. So long as the group meets the require-

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<sup>58</sup> Compare with Smith, *loc. cit.*, footnote 48.

<sup>59</sup> *Supra*, footnote 4, at pp. 379-382 (S.C.R.), 337-339 (D.L.R.).

<sup>60</sup> The position parallels that described by the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria*, *supra*, footnote 52, at pp. 403-404: "In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading." This passage was cited by Hall J. in *Calder*, *supra*, footnote 10, at pp. 355 (S.C.R.), 175 (D.L.R.), and the decision itself was referred to with approval by Dickson J. in *Guerin*, *supra*, footnote 4, at pp. 378 (S.C.R.), 336 (D.L.R.).

<sup>61</sup> On the mutability of native custom, see the remarks of Sissons J. in *Re Noah Estate*, *supra*, footnote 34, at p. 197.

ments of the doctrine of aboriginal land rights, notably the requirement of actual use and possession, it holds a collective title. The fact that group custom does not acknowledge private ownership may be relevant in determining the rights of individual group-members, but it does not affect the title of the group as a whole.

The same considerations suggest that aboriginal land rights are not confined to "traditional" uses of land.<sup>62</sup> The doctrine of aboriginal title attributes to a native group a sphere of autonomy, whereby it can determine freely how to use its lands. Its decisions may be influenced, of course, by "traditional" notions, but the stronger influence in the end will likely be current needs and attitudes. For most native groups, land use is a matter of survival not nostalgia.<sup>63</sup>

Some courts, however, have expressed the view that a native group is permanently limited in its use of aboriginal lands to customary practices followed at a distant historical period, such as the time the Crown first acquired sovereignty.<sup>64</sup> On this supposition, aboriginal title is like an historical diorama in a museum. Here a smiling native strips birch-bark from a tree, there a warrior aims bow and arrow at a mildewed deer, while in the corner a youngster plucks plastic blueberries from a withered bush. We must, of course, disregard the next display, where Indians under the stern but kindly eye of a black-robed missionary plant their first crop of corn. Agriculture, if not practiced aboriginally, is forbidden. The difficulty with this conception, of course, is that native people are not waxen figures on display for tourists, but living people who depend on the land for their livelihood. Any rule that would hold them in permanent bondage to ancient practices must be regarded with scepticism.

The history-bound view apparently draws on English rules under which a party asserting a customary right must show that the custom has existed from "time immemorial", which, for curious reasons, is associated with the year 1189.<sup>65</sup> The analogy, however, is inappropriate. As

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<sup>62</sup> This appears to be the position in United States law; see, for example, *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *United States v. Klamath Indians*, 304 U.S. 119 (1938); F.S. Cohen, *Original Indian Title* (1947-48), 32 Minn. Law Rev. 28, at pp. 54-55; Cohen, *op. cit.*, footnote 56, p. 491.

<sup>63</sup> For a compelling account of what may happen to a native group when its relationship to the land is abruptly disrupted by outside forces, see, A.M. Shkilnyk, *A Poison Stronger Than Love: The Destruction of an Ojibwa Community* (1985). It is significant that many of the land uses affected in that case were not fully "traditional" (in the sense of pre-European).

<sup>64</sup> *Hamlet of Baker Lake v. Minister of Indian Affairs*, *supra*, footnote 16, at p. 559; *Attorney General for Ontario v. Bear Island Foundation*, *supra*, footnote 16, at pp. 354-361.

<sup>65</sup> See, for example, R.M. Megarry and H.W.R. Wade, *The Law of Real Property* (5th ed., 1984), pp. 849-850, where the authors note, nevertheless, that it is not a fatal

we have seen, the doctrine of aboriginal rights is not derived from rules applying in England, but arose in response to quite different conditions. Indeed, it would have been contrary to imperial interests in America to confine native land uses to those existing at the time of contact. The European fur trade, which was central to the development of Canada, depended on the activities of native hunters and trappers whose practices had changed considerably since pre-European times.<sup>66</sup> When colonial officials, in other contexts, urged certain native groups to abandon "their wandering ways" and to take up farming, they were not sanctioning an unlawful user of land.

We must guard against the notion that native societies are essentially static in nature, that the only true aboriginal land uses are those that were practised "aboriginally". In fact, of course, native societies have never been static, and have often been characterized by an ability to adapt to shifting circumstances in a highly flexible manner. Without this flexibility, they would have had little chance of survival.<sup>67</sup> Significant changes in life-style occurred from time to time among many groups in pre-European times, and further changes took place in response to European contact. But such adaptations did not entail the abandonment of a group's essential identity.

The better view, then, is that aboriginal title gives native people the right to exclusive use and possession of their land, and the right "to use it according to their own discretion". The latter words were adopted in the *Guerin* case,<sup>68</sup> and should be taken as a rejection of the theory restricting aboriginal title to historically-based practices.<sup>69</sup> It follows that aborig-

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objection "that the nature of the custom has changed with the times; for example, an ancient custom to play games has been held to cover cricket, 'although it is reasonably certain that cricket was unknown until long after the time of Richard I'".

<sup>66</sup> Thus, Mandelbaum, *op. cit.*, footnote 49, p. 20, writes: "The advent of the Hudson's Bay Company marked the opening of a new phase in tribal fortunes. . . Both the tribal culture and locale changed greatly under the influence of the English. The culture naturally altered with the influx of European goods and with the shift of occupational emphasis from food gathering to fur trapping during certain seasons of the year. The locale was enlarged because the traders sent the natives deeper and deeper into the back country to collect furs from the different tribes and to trap in virgin territory."

<sup>67</sup> The point is made by Brody, *op. cit.*, footnote 50, pp. 21-30, 85-86, 247.

<sup>68</sup> Per Dickson J., *supra*, footnote 4, at pp. 378 (S.C.R.), 336 (D.L.R.), quoting a passage from *Johnson and Graham's Lessee v. McIntosh*, *supra*, footnote 36, at p. 574. The same passage is quoted with approval by Hall J. in the *Calder* case, *supra*, footnote 10, at pp. 381-382 (S.C.R.), 194 (D.L.R.), who reiterates at pp. 383 (S.C.R.), 195 (D.L.R.) that "the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion. . .".

<sup>69</sup> This conclusion gains further support from the cases holding that title to Indian Reserves is presumptively the same as aboriginal title, for it has never been thought that Indians can only use their Reserves in ways known to them in pre-contact times. See the

inal title includes all possible uses of land, including the right to exploit its non-renewable natural resources, unless the title has been abridged by treaty or legislation. So far as the doctrine of aboriginal rights is concerned, a native group that in the past lived mainly by hunting, fishing, and gathering may now turn its lands to farming, ranching, tourism, or mineral development.

### C. *Aboriginal Title as a Property Right*

Aboriginal title is a legal right, recognizable in the courts and maintainable against the whole world, including the Crown. It is not held at the Crown's pleasure, and cannot be extinguished normally by a unilateral exercise of Crown prerogative without recourse to Parliament.<sup>70</sup> Thus, at common law a Crown grant of lands burdened by aboriginal land rights does not extinguish those rights. The grant takes effect subject to them, or is invalid if it unequivocally purports to nullify them.

Prior to the *Guerin* decision, it was uncertain whether aboriginal title could be extinguished by prerogative act.<sup>71</sup> In *St. Catherine's Milling and Lumber Co. v. The Queen*,<sup>72</sup> the Privy Council said that Indian title held under the Proclamation of 1763 was "dependent upon the good will of the Sovereign". The statement was not explained and was not necessary to the decision. Nevertheless, it implied that Indian title was something like a mere licence to use the land, which the Crown could unilaterally revoke at any time by executive act.<sup>73</sup>

However, in the *Calder* case, the Supreme Court moved in the direction of recognizing aboriginal title as a full legal right. Although

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text *infra*, at footnote 171. See also *Simon v. The Queen*, *supra*, footnote 15, at pp. 402-403 (S.C.R.), 402-403 (D.L.R.). There the Supreme Court of Canada rejected the argument that a right to hunt "as usual" embodied in an Indian treaty was limited to hunting for purposes and by methods usual in 1752, the date the treaty was concluded. Dickson C.J.C. stated that "the inclusion of the phrase 'as usual' appears to reflect a concern that the right to hunt be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices".

<sup>70</sup> Except in exceptional situations, as in a conquered or ceded colony, where the Crown has prerogative powers of legislation before a local assembly is summoned; *Campbell v. Hall*, *supra*, footnote 37. We are not considering here the case where the Crown exercises powers conferred by statute as distinct from the royal prerogative; see text, *infra*, at footnotes 146-153, 156-157.

<sup>71</sup> See, for example, *R. v. Isaac* (1975), 13 N.S.R. (2d) 460, at pp. 476, 479 (N.S.A.D.), per MacKeigan C.J.: LaForest, *op. cit.*, footnote 48, pp. 159-160.

<sup>72</sup> *Supra*, footnote 52, at p. 54.

<sup>73</sup> Other interpretations of the Privy Council's words have been taken, notably that the Crown could express its will concerning native title only through legislation; see *Mathias v. Findlay*, [1978] 4 W.W.R. 653 (B.C.S.C.). For discussion of the question whether the Proclamation of 1763 can be amended by the Crown under the prerogative, see Slattery, *op. cit.*, footnote 19, pp. 319-328.

Judson J. merely repeats the Privy Council's statement,<sup>74</sup> Hall J. adopts a well-defined position. He writes:<sup>75</sup>

... when the Nishga people came under British sovereignty . . . they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.

By implication, then, Indian title could not be extinguished by a unilateral exercise of the prerogative.

This position was endorsed by the Supreme Court in *Guerin*. Dickson J. writes that in the *Calder* case "this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands", noting that "Judson and Hall JJ. were in agreement. . . that aboriginal title existed in Canada (at least where it has not been extinguished by appropriate legislative action). . .".<sup>76</sup> He goes on to adopt the view that the Indians were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion".<sup>77</sup>

In her separate opinion in *Guerin*, Wilson J. explicitly holds that the Indian interest "cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree".<sup>78</sup> In an important passage, she observes:<sup>79</sup>

It seems to me that the "political trust" line of authorities is clearly distinguishable from the present case because Indian title has an existence apart altogether from s. 18(1) of the *Indian Act*. It would fly in the face of the clear wording of the section to treat that interest as terminable at will by the Crown without recourse by the Band.

It might be thought obvious that, as a legal right to the exclusive possession of land maintainable against the world, aboriginal title is a property right. Yet this conclusion has sometimes been doubted.<sup>80</sup> Once

<sup>74</sup> *Supra*, footnote 10, at pp. 328 (S.C.R.), 156 (D.L.R.), Martland and Ritchie JJ. concurring.

<sup>75</sup> *Ibid.*, at pp. 402 (S.C.R.), 208 (D.L.R.), Spence and Laskin JJ. concurring.

<sup>76</sup> *Supra*, footnote 4, at pp. 376-377 (S.C.R.), 335 (D.L.R.). (Emphasis added). It may be noted that this statement does not take account of Judson J.'s ambiguity on the question of extinguishment.

<sup>77</sup> *Ibid.*, at pp. 378 (S.C.R.), 336 (D.L.R.), quoting from the judgment of Marshall C.J. of the United States Supreme Court in *Johnson and Graham's Lessee v. McIntosh*, *supra*, footnote 36, at p. 574. The first portion of the quotation is italicized in Dickson J.'s judgment. At several other points, Dickson J. emphasizes that aboriginal title is a legal right; see, for example, at pp. 378 (S.C.R.), 336, 339 (D.L.R.).

<sup>78</sup> *Ibid.*, at pp. 349 (S.C.R.), 357 (D.L.R.).

<sup>79</sup> *Ibid.*, at pp. 352 (S.C.R.), 359 (D.L.R.). (Emphasis added).

<sup>80</sup> See *Hamlet of Baker Lake v. Minister of Indian Affairs*, *supra*, footnote 16, at p. 577.



again, the confusion stems in part from the *St. Catherine's* case, where the Privy Council, in an unfortunate phrase, described Indian title as a "personal and usufructuary right".<sup>81</sup> This might be taken to mean that Indian title is not a property right but a right held in some personal capacity against the Crown. However, this interpretation was effectively discounted in the *Star Chrome*<sup>82</sup> case, where the Privy Council explained that Indian title is "a personal right in the sense that it is in its nature inalienable except by surrender to the Crown". The Supreme Court adopts the same view in *Guerin*, thereby laying any doubts to rest.<sup>83</sup>

Nevertheless, it could be argued that, since property is characteristically alienable, the restrictions on the transfer of aboriginal title prevent it from being truly proprietary in nature. This is an overly rigid view. While there may be grounds in English law for linking property with alienability, there seems to be no compelling reason for identifying the two in principle.<sup>84</sup> In any case, aboriginal title is not a concept of English land law but a *sui generis* right. The restrictions on its transfer stemmed historically from the need to accommodate the rule, binding on settlers, that title to land flows from the Crown.<sup>85</sup> These restrictions are only partial, for aboriginal title may in fact be alienated to the Crown, and possibly to other native groups.<sup>86</sup>

Properly understood, the *St. Catherine's* case stands for the proposition that Indian title is an interest in land. The Privy Council holds that Indian title is an "Interest other than that of the Province" in lands allotted to a province by the Constitution Act, 1867, within the meaning

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<sup>81</sup> *Supra*, footnote 52, at p. 54. The usefulness of this phrase was doubted by Judson J. in the *Calder* case, where he remarked with reference to the question of Indian title that "it does not help one in the solution of this problem to call it a 'personal or usufructuary right'"; *supra*, footnote 10, at pp. 328 (S.C.R.), 156 (D.L.R.). Significantly, the Privy Council itself disclaimed any intention of giving a comprehensive definition of Indian title (at p. 55): "There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point."

<sup>82</sup> *Attorney General for Quebec v. Attorney General for Canada*, [1921] 1 A.C. 401, at p. 408, (1920), 56 D.L.R. 373, at p. 377 (P.C.).

<sup>83</sup> Dickson J. states: "... the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee. . ."; *supra*, footnote 4, at pp. 382 (S.C.R.), 339 (D.L.R.). See also *Smith v. The Queen*, [1983] 1 S.C.R. 554, at p. 571, (1983), 147 D.L.R. (3d) 237, at p. 251.

<sup>84</sup> Lysyk, *loc. cit.*, footnote 10, at p. 471 notes: "... restrictions on alienation are familiar to recognized interests in land at common law, for example, in leases or in estates in fee tail. As one writer has observed, at English common law there were times when most of the land in England could not be sold to anyone." (footnotes omitted).

<sup>85</sup> See discussion in text, *supra*, footnotes 52-54.

<sup>86</sup> See the remarks in the *Star Chrome* case, quoted in text, *supra*, at footnote 82, and discussion in text following footnote 53, *supra*.

of section 109 of the Act.<sup>87</sup> Thus, a Province holds only the underlying title to any lands affected by aboriginal title, until the title is surrendered to the Crown, at which point the lands become available to the Province as a source of revenue. As the Privy Council later observed, the phrase an "Interest other than that of the Province" in section 109 denotes "some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province".<sup>88</sup> It follows that Indian title is an interest in land, independent of and opposable to the Crown's underlying title, which it burdens.

The same view permeates the terminology used in the *Guerin* case. Dickson J. speaks of the existence of "aboriginal, native, or Indian title", and of the "fact that Indian bands have a certain interest in lands", later describing the title as "a unique interest in land". Estey J. refers to "the rights of the native population in those lands to which they had a longstanding connection", and Wilson J. to "the aboriginal title of Canada's Indians".<sup>89</sup>

#### D. *Aboriginal Title as a Compensable Right*

The fact that aboriginal title is an interest in land means that it benefits from the common law presumption favouring the payment of just compensation upon a compulsory taking.<sup>90</sup> In the absence of clear words to the contrary, statutes that unilaterally extinguish aboriginal land rights should be interpreted as providing for compensation.<sup>91</sup>

The concept that aboriginal title is a compensable right is not a refinement of modern jurisprudence. It is an intrinsic part of the characterization of aboriginal title found in the Royal Proclamation of 1763. Indian lands are defined there as "such Parts of Our Dominions and Territories as, *not having been ceded to, or purchased by Us*, are reserved to them. . .". The Crown provides that "if, at any Time, any of the

<sup>87</sup> *St. Catherine's Milling and Lumber Co. v. The Queen*, *supra*, footnote 52, at p. 58.

<sup>88</sup> *Attorney General for Canada v. Attorney General for Ontario*, [1897] A.C. 199, at pp. 210-211 (P.C.).

<sup>89</sup> *Supra*, footnote 4, at pp. 349, 376, 382, 392 (S.C.R.), 334, 339, 346 and 356 (D.L.R.).

<sup>90</sup> See, for example, *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, [1978] 6 W.W.R. 496; *Attorney General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.).

<sup>91</sup> In *Paul v. Canadian Pacific Ltd.* (1983), 2 D.L.R. (4th) 22 (N.B.C.A.), LaForest, J.A. states at p. 34: "When a taking is, in fact, authorized by statute, it is presumed that compensation will be paid. . . This, like the presumption against taking, must apply with additional force to the taking of Indian lands because this affects the honour and good faith of the Crown." For discussion, see B. Slatery, *The Constitutional Guarantee of Aboriginal and Treaty Rights* (1982-83), 8 Queen's Law J. 232, at pp. 270-273.

said Indians *should be inclined to dispose of* the said Lands, the same *shall be purchased* only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose. . . .<sup>92</sup> Aboriginal title is thus portrayed as a valuable interest in land normally acquired by purchase. It follows that, where the Crown does not buy Indian lands for a mutually-agreed price but expropriates them, the act will be governed by the normal presumption requiring payment of just compensation.

Canadian law differs on this point from that of the United States. In *Tee-Hit-Ton Indians v. United States*,<sup>93</sup> the Supreme Court held that Indian title is not a property right within the meaning of the Fifth Amendment so as to require compensation to be paid for a Congressional taking, unless Congress had previously recognized that the Indians were legally entitled to occupy permanently the lands in question. This holding posits that "unrecognized" Indian title is not a legal right but merely permissive occupation of land.<sup>94</sup> Thus, the court observes that the "manner, method and time" of the extinguishment of Indian title "raise political not justiciable issues";<sup>95</sup> that "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law";<sup>96</sup> that even when Indians ceded their lands to the government by treaty "it was not a sale but the conquerors' will that deprived them of their land";<sup>97</sup> and that monies given for the termination of Indian occupancy are "gratuities" rather than "compensation for its value".<sup>98</sup>

The *Tee-Hit-Ton* decision has attracted strong criticism.<sup>99</sup> For our purposes, it is sufficient to note that the Supreme Court of Canada in the *Guerin* case takes a markedly different view.<sup>100</sup> As just seen, the judges hold that aboriginal title is "a unique interest in land"<sup>101</sup> and an "inde-

<sup>92</sup> (Emphasis added).

<sup>93</sup> 348 U.S. 272 (1955).

<sup>94</sup> *Ibid.*, at pp. 278-279.

<sup>95</sup> *Ibid.*, at p. 281, quoting *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, at p. 347 (1941).

<sup>96</sup> *Ibid.*, at p. 285.

<sup>97</sup> *Ibid.*, at p. 290.

<sup>98</sup> *Ibid.*, at p. 291.

<sup>99</sup> See, for example, Henderson, *loc. cit.*, footnote 36, at pp. 109-122. For analysis, see Kelly, *loc. cit.*, footnote 56, at p. 664 ff.

<sup>100</sup> In this respect, then, the *Guerin* decision effectively confirms the view of Hall J. in *Calder*, *supra*, footnote 10, at pp. 352, 385-386 (S.C.R.), 173, 196-197, 219 (D.L.R.), in preference to the view apparently taken by Judson J., at pp. 343-344 (S.C.R.), 166-168 (D.L.R.).

<sup>101</sup> *Supra*, footnote 4, at pp. 382 (S.C.R.), 339 (D.L.R.), per Dickson J.

pendent legal right",<sup>102</sup> that the manner of its extinction raises justiciable not merely political issues,<sup>103</sup> and that it cannot be terminated at the will of the Crown.<sup>104</sup> The same conclusions spring naturally from a review of historical Crown practice in extinguishing Indian title.

### E. *The Crown's Fiduciary Role respecting Native Lands*<sup>105</sup>

The Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands. This general fiduciary duty has its origins in the Crown's historical commitment to protect native peoples from the inroads of British settlers, in return for a native undertaking to renounce the use of force to defend themselves and to accept instead the protection of the Crown as its subjects. In offering its protection, the Crown was animated less by philanthropy or moral sentiment than by the need to establish peaceful relations with peoples whose friendship was a source of military and economic advantage, and whose enmity was a threat to the security and prosperity of the colonies. The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.<sup>106</sup>

This fact is reflected in the Royal Proclamation of 1763, which states that "it is just and reasonable, and *essential to Our Interest and the Security of Our Colonies*, that the several Nations or Tribes of Indians, with whom We are connected, and *who live under Our Protection*, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds".<sup>107</sup> One manifestation of this general duty of protection is the Proclamation's prohibition of private purchases of Indian lands. But the same duty of protection underlies the Proclamation's other Indian pro-

<sup>102</sup> *Ibid.*, at pp. 378 (S.C.R.), 336 (D.L.R.), per Dickson J.

<sup>103</sup> *Ibid.*, at pp. 375, 378-379 (S.C.R.), 334, 336 (D.L.R.), per Dickson J.; at pp. 350-352 (S.C.R.), 357-359 (D.L.R.), per Wilson J.

<sup>104</sup> *Ibid.*, at pp. 350, 352 (S.C.R.), 357, 359 (D.L.R.), per Wilson J.

<sup>105</sup> See, generally, Note: Rethinking the Trust Doctrine in Federal Indian Law (1984-85), 98 Harv. Law Rev. 422; R.P. Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians (1974-75), 27 Stan. Law Rev. 1213.

<sup>106</sup> Paternalistic attitudes became more prevalent in Canada during the nineteenth and twentieth centuries, but, by and large, they did not characterize British-Indian relations of the formative period 1600-1800; see the remarks of Strong J. in *St. Catharines Milling and Lumber Co. v. The Queen*, *supra*, footnote 32, at p. 609, and generally, Slaterry, *op. cit.*, footnote 19, *passim*.

<sup>107</sup> *Supra*, footnote 3. (Emphasis added).

visions, notably those that prohibit colonial Governors from issuing patents for unceded Indian lands and require settlers to remove themselves from such lands.

The *Guerin* decision, while dealing only with the particular fiduciary relations created by a surrender of Indian lands to the Crown, suggests that a more general fiduciary duty exists that informs and explains those relations.<sup>108</sup> Estey J. observes that the Constitution and the various laws concerning Indians before and after Confederation "all reflect a strong sense of awareness of the community interest in protecting the rights of the native population in those lands to which they had a longstanding connection".<sup>109</sup> This protective concern, he adds, underlies the long-standing rule that native lands can only be alienated to the Crown.

Dickson J. also draws attention to this restriction on alienation and states his view of its significance in the following passage:<sup>110</sup>

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interest and to the great Dissatisfaction of the said Indians. . .".

He goes on to say that the Indian Act confirms "the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties".<sup>111</sup>

Wilson J. explicitly recognizes the existence of a general fiduciary responsibility to protect Indian lands. She states that when section 18 of the Indian Act<sup>112</sup> directs that reserves be held by the Crown for the use and benefit of the bands for which they are set apart, this is "the acknowledgment of a historic reality, namely, that Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it".<sup>113</sup>

It is important to understand that the possessory rights of native groups in aboriginal lands both precede and are logically distinct from

<sup>108</sup> The view that the fiduciary duty recognized in *Guerin* extends beyond the narrow context of surrenders receives support from *Kruger v. The Queen* (1985), 17 D.L.R. (4th) 591 (F.C.A.), per Heald J., at pp. 595-598, per Urie J., at pp. 645-647, per Stone J., at p. 658.

<sup>109</sup> *Supra*, footnote 4, at pp. 392 (S.C.R.), 346 (D.L.R.).

<sup>110</sup> *Ibid.*, at pp. 383 (S.C.R.), 340 (D.L.R.).

<sup>111</sup> *Ibid.*

<sup>112</sup> R.S.C. 1970, c. 1-6.

<sup>113</sup> *Supra*, footnote 4, at pp. 349 (S.C.R.), 356-357 (D.L.R.).

any rights flowing from the fiduciary relationship. Aboriginal title is a condition precedent for the existence of a general fiduciary obligation to protect aboriginal lands; it is not the creature or product of the fiduciary relationship.<sup>114</sup> Rather, as Dickson J. emphasizes in *Guerin*, aboriginal title exists apart from any executive or legislative act,<sup>115</sup> and, by implication, apart from any fiduciary obligations owed by the Crown.

The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust.<sup>116</sup> But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.

### III. *Aboriginal Title: Acquisition and Extinguishment*

We have seen, then, that the doctrine of aboriginal land rights is a distinctive body of common law rules that governs a variety of matters concerning aboriginal peoples and their use of lands. These matters fall into three main areas. First, the doctrine defines the legal categories of "Indian Territories", "General Lands", and "Indian Reserves", and determines how lands may pass from one category to another. Second, the doctrine defines the concept of aboriginal title, and describes its general character, and the manner in which it may be gained and lost; the doctrine also characterizes such related concepts as title to Indian Reserves, and rights of hunting, fishing, and trapping on ceded lands. Third, the doctrine determines the fiduciary responsibilities of the Crown regarding native lands. In dealing with these matters, the doctrine touches upon several topics belonging to other branches of the doctrine of aboriginal rights, notably the status and effects of Indian treaties, and the survival of native custom.

These subjects all merit more detailed treatment. However, in this paper we can deal with only a few of them. Part III discusses the acquisition and proof of aboriginal title, and the ways it can be extinguished. Part IV reviews the relationship between aboriginal title and title to Indian Reserves, and Part V deals with the troublesome topic of legislative authority over aboriginal rights. In discussing these matters, it will be convenient at times to use a vocabulary borrowed from European-style

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<sup>114</sup> As Dickson J. observes in *Guerin*, *ibid.*, at pp. 376 (S.C.R.), 334 (D.L.R.): "The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself, give rise to a fiduciary relationship between the Indians and the Crown."

<sup>115</sup> See Dickson J. in *Guerin*, *ibid.*, at pp. 376-382 (S.C.R.), 335-339 (D.L.R.).

<sup>116</sup> See discussion, *infra*, at footnotes 174-176, 188-221.

property systems. This terminology should be understood in a broad, non-technical sense, and not as detracting from the *sui generis* nature of aboriginal title.

### A. Acquisition and Proof

We saw earlier that the advent of European settlement in America did not permanently freeze the boundaries of native territories or tie native peoples to the lands that they happened to possess at the time. Aboriginal title was based on possession, and so could be acquired by appropriation and lost by abandonment. Here we will examine the process of acquisition more closely. The topic is, at present, an undeveloped one, and awaits authoritative judicial treatment. So, we are venturing into relatively uncharted territory.

Nevertheless, reflection on the essential features of aboriginal title suggests that for such title to be acquired, four criteria must be satisfied:

- (1) The parties asserting aboriginal title must constitute an organized group of native people.
- (2) The group must possess the lands claimed.
- (3) The group must have possessed the lands for a substantial period.
- (4) The lands must form part of the Indian Territories.

These criteria apply to groups asserting title on the basis of *current* occupation. But they can easily be adapted for other situations, such as where a native group asserts that it held aboriginal title in the past and was unlawfully dispossessed. In the latter case, the criteria would apply as of the time of dispossession.

#### (1) *The parties asserting aboriginal title must constitute an organized group of native people.*

This criterion excludes claims advanced by individuals. Aboriginal title as such is a collective right vested in a group.<sup>117</sup> It should be noted that this does not mean that individual members of a native group cannot hold legally enforceable rights to a share in the group's collective title under the rules in force within the group. Such rights are not, however, aboriginal title in the strict sense. The criterion also disqualifies collections of people that lack sufficient coherence, permanence, or self-identity to qualify as an organized group. But these requirements must be applied flexibly, in light of the varying levels of organization found in aboriginal societies.

The group asserting title must be of native descent. This is a matter of degree, to be ascertained in each case. Clearly, a group is not dis-

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<sup>117</sup> See, nevertheless, *Cramer v. United States*, 261 U.S. 219, at pp. 226-230 (1923).

qualified by the fact that some or even all of its members are of mixed native and non-native origins, or that others (such as spouses) have no native blood at all.<sup>118</sup> Historically, groups composed mainly or entirely of Metis or "half-breeds" have been accepted as native groups, and this fact is now recognized in section 35(2) of the Constitution Act, 1982,<sup>119</sup> which states that the phrase "aboriginal peoples of Canada", as used in the Act, includes the Indian, Inuit and Metis peoples of Canada.

In determining whether or not a group of people qualifies as "native", regard should be had to a variety of factors, such as: (a) the self-identity of its members, as shown in their actions and statements; (b) the culture and way of life of the group; (c) the existence of group norms or customs similar to those of other aboriginal peoples; and (d) the genetic composition of the group.

(2) *The group must possess the lands claimed.*

The central feature of aboriginal title is that it is founded on possession.<sup>120</sup> This fact must be kept firmly in mind, for there is a tendency to assimilate aboriginal title to estates known to English law,<sup>121</sup> where the dominant form of title is derivative, and titles to land theoretically can be traced back to a Crown grant.<sup>122</sup>

English law recognizes, of course, that title to land may be gained by adverse possession under statutes of limitation. Such a title is based on possession rather than a grant or transfer of title.<sup>123</sup> A possessory title of this kind has some points of similarity with aboriginal title. But caution is necessary in drawing analogies between the two forms in view of the unique context in which aboriginal title arose.

<sup>118</sup> See discussion in *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F. 2d 935, at pp. 942-944 (U.S. Ct. Cl., 1974).

<sup>119</sup> *Supra*, footnote 1.

<sup>120</sup> See, for example, the *Guerin* decision, *supra*, footnote 4, at pp. 382 (S.C.R.), 339 (D.L.R.), where Dickson J. characterizes aboriginal title as "a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown."; and Estey J. refers, at pp. 393 (S.C.R.), 347 (D.L.R.), to the Indians' "right of possession".

<sup>121</sup> As Viscount Haldane remarked in *Amodu Tijani v. Secretary, Southern Nigeria*, *supra*, footnote 52, at pp. 402-403: "... in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely." This passage was quoted with approval by Hall J. in the *Calder* decision, *supra*, footnote 10, at pp. 354 (S.C.R.), 175 (D.L.R.).

<sup>122</sup> See Megarry and Wade, *op. cit.*, footnote 65, p. 102.

<sup>123</sup> See Megarry and Wade, *ibid.*, pp. 102-109; G.C. Cheshire and E.H. Burn, *Modern Law of Real Property* (13th ed., 1982), pp. 26-30; F. Pollock and R.S. Wright, *An Essay on Possession in the Common Law* (1888), pp. 91-100.



In determining whether a group can be said to possess certain lands, one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed. It would be unrealistic to expect a group of hunters to possess their hunting grounds in the same way as a farmer occupies his fields, or to require that lands be used to their maximum potential with the best available technology. The fact that a tract of land could be mined productively does not mean that a hunting group that exploits its renewable surface resources is not truly in possession.<sup>124</sup>

It is submitted that a native group need not be the sole possessor of lands to hold aboriginal title, but may share the lands with other groups. Two main types of sharing may be envisaged, which do not necessarily exhaust the field. In some cases, several groups may hold a *joint title* to certain lands, where there is an explicit or tacit agreement to this effect. In other cases, the groups may hold *distinct but overlapping titles* that are not the product of any true agreement. Whatever the situation, the courts should endeavour to give effect to the actual patterns of use existing among the groups in question, in keeping with the *sui generis* character of aboriginal title, rather than to impose a set of rigid and alien requirements.<sup>125</sup> Otherwise there is the danger that a territory continuously used and occupied by several native peoples would be considered vacant.

(3) *The group must have possessed the lands for a substantial period.*

The claimant group must show that it has an enduring relationship with the lands in question, sufficient to defeat the claims of previous native possessors and to resist newcomers. The requisite length of time depends on the circumstances, but in most cases a period of some twenty to fifty years would seem adequate. Time is less important for its own sake than for what it says about the nature of the group's relationship with the land and the overall merits of their claim.

The view expressed here, however, is opposed by another view, which has won some judicial support. This theory, which may be called the "frozen title" theory, takes two forms. In its pure form, it requires proof that a claimant group has continuously used and occupied the lands claimed since "time immemorial". That date, which represents

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<sup>124</sup> See *Mitchel v. United States*, 9 Peters 711, at p. 746 (1835), where Baldwin J. stated with regard to the British law applying in the American colonies in 1763: "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected. . ."

<sup>125</sup> Compare with the somewhat more stringent American criterion requiring joint and amicable possession: Cohen, *op. cit.*, footnote 56, p. 492.

the limits of legal memory, is determined by the advent of European sovereignty in the area.<sup>126</sup> In other words, it is not sufficient for the claimant group to show that it has held the land for a substantial period of time, even a very long period such as several centuries. So long as its possession does not predate European settlement, its claim cannot be sustained. Thus, in Eastern Canada, where permanent European settlements were founded in the early 1600s, native claimants would have to prove continuous possession for over three hundred and fifty years. If the voyages of Cabot, Verrazzano, and Cartier were accepted as starting points, even longer periods would be required.

In its pure form, the "frozen title" theory maintains that the claimant group must *itself* have been in possession at the relevant date, that it cannot inherit title from earlier occupants or tack its possession on to theirs. But the theory could be adapted so as to allow a group to prove that its possession is *linked* by conquest, cession, merger, exchange, or adverse possession to the title of preceding groups in a chain extending back to the relevant date. This adapted version, while allowing for more flexibility, would still require the same kind of historical quarrying.

It may be observed that the "frozen title" theory implicitly treats aboriginal title as a form of derivative title based on a Crown grant. The underlying notion is that when the British Crown or some other European sovereign first came to North America it tacitly granted native groups the right to use and occupy the precise lands they possessed at that time and no others. On this premise, it follows that a claimant group must prove an unbroken line of title extending back to the original presumed grant, a line that links them both to the original grantees and the original lands granted.

The basic objection to this approach is that it forces aboriginal title into a mold familiar to English law, while disregarding the factors peculiar to its origins. Aboriginal title is located outside the feudal scheme

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<sup>126</sup> The "frozen title" theory was first put forward in the *Baker Lake* case, *supra*, footnote 16, at pp. 557-558, 562. For the lands in question there (located in the Northwest Territories near Hudson Bay), the relevant date was held to be probably no earlier than 1610 and certainly no later than 1670. Curiously, the court did not explain why possession from time immemorial was necessary to establish aboriginal title, or cite authorities specifically supporting this position. The court refers, at p. 558, to several cases as supporting a series of propositions laid down regarding aboriginal title, one being the requirement in question. Although references can be found in some of these cases to possession of aboriginal lands from time immemorial, none of the cases specifically holds that this is an essential requirement for proof of aboriginal title. Nevertheless, the *Baker Lake* theory was later adopted in the *Bear Island* case, again without explanation: *supra*, footnote 16, at pp. 335, 340-341, 353, 361-362. There are recent American authorities explicitly rejecting the proposition accepted by the court; see the illuminating discussion in *Sac and Fox Tribe of Indians of Oklahoma v. United States*, 383 F. 2d 991, at pp. 996-999 (U.S. Ct. Cl., 1967), and *Turtle Mountain Band of Chippewa Indians v. United States*, *supra*, footnote 118, at pp. 941-942.

that permeates English land law. Its basis is possession. As Judson J. noted in the *Calder* case, “. . . the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means. . .”.<sup>127</sup>

From the earliest days of colonization, Europeans were aware that boundaries between native tribes and bands shifted over time. It would have seemed strange to suggest that the founding of small European settlements on the eastern coastline had permanently crystallized native boundaries inland. In practice, the Crown recognized that native groups were entitled to the lands they actually used and occupied at any given time, so long as their possession was not purely transitory. When the Crown wanted to secure the cession of Indian lands, it dealt with the native group actually occupying them.

This practice was not just a matter of administrative convenience. To have acted otherwise would have attacked the very basis of aboriginal title and undermined the purpose it served. A “frozen title” theory would have been a fertile source of conflict between the Crown and Indian nations, conflict that the fragile settler communities could ill afford. It would also have rendered official cessions of native lands insecure, introducing doubts as to whether the native group signing the surrender was in fact the one entitled to do so. It would have turned a substantial number of native groups into squatters on their own lands, notably in the Canadian Prairies, where many of the modern native occupants arrived after the Crown’s initial assertion of sovereignty.<sup>128</sup> Yet those same native hunters were essential to the prosperity of the fur trade and the survival of the Hudson’s Bay Company. Finally, the theory would have frustrated the governmental policy of encouraging native self-subsistence, barring a native group from migrating to another area when the game on its lands was depleted, the area was devastated by fire or flood, or the population swelled beyond the land’s capacity.

It could be argued that the adapted version of the theory avoids these pitfalls by allowing native groups to move to lands already occupied by other native peoples and acquire their title. However, this version of the theory has an odd anomaly. It holds that an Indian group that seizes the territory of another group may acquire aboriginal title, but a migrating group that settles on vacant lands, having failed to find some other Indians to oust, cannot gain title no matter how long they stay there.<sup>129</sup> The conqueror is rewarded and the peaceful migrant punished.

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<sup>127</sup> *Supra*, footnote 10, at pp. 328 (S.C.R.), 156 (D.L.R.).

<sup>128</sup> See Mandelbaum, *op. cit.*, footnote 49.

<sup>129</sup> This point is made in *Turtle Mountain Band of Chippewa Indians v. United States*, *supra*, footnote 118, at pp. 941-942.

The "frozen title" theory also has serious practical difficulties. The requirement that title be traced back to the advent of Europeans presupposes the existence of orderly documentary records showing the location and extent of aboriginal lands and the identity of successive native occupants. Yet documentary evidence for early periods of Canadian history is at best fragmentary, and what little can be unearthed is often open to varying interpretations. It is reasonable to think that the theory of aboriginal title does not entail an evidentiary requirement that normally cannot be met.<sup>130</sup>

The better view, then, is that a native group need only show that it has possessed the lands claimed for a period of time sufficient to establish a stable relationship with them, and to defeat the claims of previous native occupants. Possession from "time immemorial" need not be shown.

(4) *The lands must form part of the Indian Territories.*

The final requirement for the acquisition of aboriginal title is that the lands claimed must form part of the Indian Territories. Lands previously removed from the Territories and converted to General Lands are no longer freely available for appropriation by native groups.

We will consider in the next section the ways in which lands in the Indian Territories may lawfully be transformed into General Lands. Here it is sufficient to note that where a group asserts aboriginal title to lands currently in their possession, it will be presumed in law that the lands still form part of the Indian Territories, in the absence of proof to the contrary. It is for the party submitting that the lands have been converted to General Lands to establish that fact.<sup>131</sup> Otherwise the group claiming aboriginal title would be put to the task of proving a negative, namely that at no previous time had the lands been withdrawn from the Indian Territories. The same presumption operates where the claimant group is not currently in possession of the lands but can show that it held them at some time in the past, in which case the presumption applies to the period when the group was last in possession.

B. *Removal of Land from the Indian Territories and Extinguishment of Aboriginal Title*

As we have seen, the Indian Territories are lands under Crown sovereignty that are open to native use and occupation. However, not

<sup>130</sup> In *Simon v. The Queen*, *supra*, footnote 15, at pp. 407-408 (S.C.R.), 407 (D.L.R.), the Supreme Court of Canada, in the course of holding that relatively slim evidence was sufficient to prove that an Indian was a descendant of Micmac Indians who signed a treaty with the Crown in 1752, stated: "It must. . . be sufficient, for otherwise no Micmac Indian would be able to establish descendency. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty."

every part of the Indian Territories is necessarily subject to aboriginal land rights at a given time. Areas that have not been occupied or used by native peoples for a considerable period are free of aboriginal title for the time being.<sup>132</sup> But as long as they are part of the Indian Territories they remain available for native occupation in the future. In principle, then, one can distinguish between the Indian Territories proper and the areas within the Territories that are subject to aboriginal title.

This distinction gives rise to two separate but related questions. First, in what ways may lands in the Indian Territories be converted to General Lands, and thus made available for settlement? Second, in what ways may aboriginal title be extinguished? The questions are closely linked in practice, because the conversion of lands in the Indian Territories to General Lands usually involves the extinguishment of aboriginal title, and the extinguishment of aboriginal title often converts the lands in question to General Lands. However, in neither instance is this always true. Thus, where the lands withdrawn from the Indian Territories are vacant at the time, the withdrawal does not extinguish the aboriginal title of any group. Again, where a native group abandons lands in the Indian Territories, their aboriginal title to the lands will lapse after a period, but the lands will remain in the Indian Territories.

We will deal first with the ways of withdrawing lands from the Indian Territories, covering both vacant and occupied lands. In doing this, we will also consider most of the methods for extinguishing aboriginal title. We will then briefly consider methods of extinguishment that do not involve a withdrawal from the Indian Territories.

### (1) *Removal of Lands from the Indian Territories*

What lands make up the Indian Territories? The simple answer, which requires elaboration, is as follows. Under the doctrine of aboriginal land rights, all North American lands claimed by the Crown presumptively form part of the Indian Territories; the presumption is defeated by proof of a lawful act converting portions of the Indian Territories into General Lands or Indian Reserves. The Indian Territories, then, are a residual category: they comprise what remains after lands converted to

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<sup>131</sup> In *Simon v. The Queen*, *ibid.*, it was argued that the Crown had extinguished native rights to all territories in Nova Scotia outside of Indian reserves, and in so doing had extinguished a treaty right to hunt over such lands. The court held, at pp. 405-407 (S.C.R.), 405-406 (D.L.R.), that strict proof of the fact of extinguishment is required in each case, remarking: "It is impossible for this Court to consider the doctrine of extinguishment 'in the air'; the respondent must anchor that argument in the bedrock of specific lands." In the *Calder* case, *supra*, footnote 10, at pp. 404 (S.C.R.), 210 D.L.R.), Hall J. stated that the onus of proving extinguishment of Indian title lies on the party alleging extinguishment.

<sup>132</sup> As will be argued below, the failure to occupy or use lands did not bring about the immediate cessation of aboriginal title; a certain period of time was necessary.

General Lands and Indian Reserves are subtracted. Here we are concerned only with the transformation of Indian Territories into General Lands. The creation of Indian Reserves will be discussed later.<sup>133</sup>

Under the doctrine of aboriginal title, the prime method for converting Indian Territories into General Lands is cession from the native occupants to the Crown. Arguments of varying strength can also be made for additional methods: Crown occupation, statutory taking, act of state, Crown grant, adverse possession, and act of the French Crown. We will examine each of these as a matter of Canadian common law, while also giving some attention to the Royal Proclamation of 1763 and the Constitution Acts of 1867 and 1982.

(a) *Cession*

A native group may cede or sell lands in its possession to the Crown, thus extinguishing its rights in accordance with the terms of the agreement. Any lands ceded outright cease to belong to the Indian Territories and enter the general land system of the jurisdiction. For a treaty to extinguish aboriginal title, it must be concluded voluntarily by the group holding title to the land, with knowledge of the significance of the transaction.

From the early stages of English settlement, private individuals often purchased lands from the Indians and claimed to have obtained a title that was valid within the general land system of the colony. Such transactions were repeatedly forbidden by legislation passed in most of the English colonies, and were generally outlawed by royal decree in the Royal Proclamation of 1763.<sup>134</sup> Official practice coupled with strong policy considerations gave rise to a common law rule that aboriginal title cannot be transferred to private persons but only to the Crown.<sup>135</sup> As noted earlier, this rule seemingly did not affect the capacity of native peoples to deal in lands among themselves, assuming that native custom permitted transactions of this kind.<sup>136</sup>

The Federal Crown has the exclusive power to negotiate land cession agreements with Indians under section 91(24) of the Constitution Act, 1867.<sup>137</sup> Indian lands that are surrendered to the Federal Crown pass into the general land system of the Province in which they are

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<sup>133</sup> See below, the text at footnotes 165-171.

<sup>134</sup> See Slattery, *op. cit.*, footnote 19, pp. 112-117, 310-312.

<sup>135</sup> *Johnson and Graham's Lessee v. McIntosh*, *supra*, footnote 36; *Calder v. Attorney-General of British Columbia*, *supra*, footnote 10, per Judson J., at pp. 320-321 (S.C.R.), 151 D.L.R.), per Hall J., at pp. 381-385 (S.C.R.), 194-196 (D.L.R.). See text above at footnotes 52-54.

<sup>136</sup> See text above, at footnote 54.

<sup>137</sup> *Supra*, footnote 43. See the discussion below at footnotes 174-176, 188-221.

located and, in the absence of special agreements, are at the disposal of the Provincial Crown.<sup>138</sup> It seems likely that the federal power to negotiate land cessions has not ended with the entrenchment of "existing aboriginal and treaty rights" in section 35(1) of the Constitution Act, 1982.<sup>139</sup> The section protects unextinguished aboriginal land rights from future statutory abridgment, but it does not prohibit voluntary cessions to the Crown. Nevertheless, the section arguably imports strict constitutional standards safeguarding the interests of the native groups concerned and ensuring the essential fairness of a cession.<sup>140</sup>

(b) *Crown occupation*

It is submitted that the Crown or persons acting under its authority may take possession of lands within the Indian Territories that are not at that time subject to the aboriginal rights of any native group.<sup>141</sup> These lands enter the general land system of the relevant jurisdiction and henceforth are not available for native appropriation under aboriginal title. For this mode to operate, the lands in question must be free of existing aboriginal rights. The fact that lands are temporarily unoccupied does not necessarily mean that they are legally vacant, because, as will be seen below, a certain period of time must pass before a native group loses title to lands that it has ceased to occupy.

It could be argued, to the contrary, that lands in the Indian Territories cannot be converted to General Lands by occupation, because this method allows the Crown to reduce unilaterally the stock of lands available for aboriginal occupation without the consent of the native peoples indirectly affected. This argument suggests, in effect, that the Indian Territories are the patrimony of native peoples generally, and cannot be appropriated by the Crown without native consent, in the absence of valid legislation. The argument, however, is not persuasive. Were it true, Indian Territories that were *not* burdened by aboriginal title could not readily be converted to General Lands because there would be no identifiable native group capable of ceding them. Thus, such lands would actually be more difficult for the Crown to obtain for settlement than lands subject to aboriginal title, where the title-holders could be identified.

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<sup>138</sup> *St. Catherine's Milling and Lumber Co. v. The Queen*, *supra*, footnote 52.

<sup>139</sup> *Supra*, footnote 1.

<sup>140</sup> The argument is made in Slaterry, *loc. cit.*, footnote 91, at pp. 256-257; B. Slaterry, *The Hidden Constitution: Aboriginal Rights in Canada* (1984), 32 *Amer. J. of Comp. Law* 361, at p. 387.

<sup>141</sup> As seen earlier, the Crown cannot, by virtue of the prerogative, lawfully take possession of lands burdened by aboriginal title; see text, *supra*, at footnotes 70-79. Moreover, private individuals cannot gain title to vacant lands in the Indian Territories by occupation, in the absence of authority from the Crown in a grant; see discussion below at footnotes 158-159.

It seems probable, then, that occupation is a valid method of transferring lands from the Indian Territories, and that the settlement of certain parts of Canada, such as portions of the St. Lawrence Valley, can be justified on this basis. It should be noted, however, that the amount of land available for unilateral occupation by the Crown was always relatively small.

The Crown or its deputies must perform definite acts of possession in order to remove vacant lands from the Indian Territories by occupation. A Crown grant coupled with possessory acts by the grantee would be sufficient, but it is submitted that a grant standing alone would not.<sup>142</sup> Unless the grantee takes possession, the land arguably remains available for aboriginal occupation. This observation, however, does not apply to lands withdrawn from the Indian Territories by other methods, such as cession. It is submitted that these lands are permanently removed from the pool of lands available for aboriginal occupation, regardless of whether or not they are granted out by the Crown or are actually in anyone's possession. Otherwise the Crown might have to secure the cession of lands several times over, and grants of ceded lands would often be affected by uncertainty over the lands' status.

Occupation as a mode of withdrawing lands from the Indian Territories may have virtually ceased to operate in the Provinces at Confederation, due to the division of powers effected in the Constitution Act, 1867.<sup>143</sup> The provincial Crown has the general power to grant lands within provincial boundaries, but its capacity to withdraw unoccupied lands from the Indian Territories is seemingly limited by section 91(24) of the Act, which gives the federal government jurisdiction over "Indians and Lands reserved for the Indians".<sup>144</sup> The federal Crown, on the other hand, arguably has general legislative and administrative authority over aboriginal lands under that section, but lacks the power to grant such lands to others.<sup>145</sup> The result may be that neither Crown can withdraw vacant land from the Indian Territories simply by means of a grant.

### (c) *Statutory taking*

Aboriginal title, like other property rights, can in principle be statutorily expropriated, subject to any constitutional limitations. The statute must express a clear intention to terminate Indian title, whether by specific words or necessary implication, and ambiguous phraseology will be inter-

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<sup>142</sup> Certainly, the original Royal Charters granting North American lands to various groups and individuals were not in practice taken to convert Indian Territories into lands unavailable for native appropriation; see discussion in Slattery, *op. cit.*, footnote 19, pp. 95-125.

<sup>143</sup> *Supra*, footnote 43.

<sup>144</sup> See *infra*, at footnotes 174-176, 188-221.

<sup>145</sup> *St. Catherine's Milling and Lumber Co. v. The Queen*, *supra*, footnote 52.



preted in favour of the Indians.<sup>146</sup> The taking of native lands presumptively gives rise to a duty to pay fair compensation.<sup>147</sup> Generally speaking, the Crown cannot expropriate aboriginal lands by prerogative act; legislation is required.<sup>148</sup>

As we will see later, it can be argued that the Royal Proclamation of 1763<sup>149</sup> imposed strict constitutional limitations on the power of local Canadian legislatures to expropriate aboriginal land rights. These restrictions remained in place until the passage of the Constitution Act, 1867,<sup>150</sup> or possibly until the Statute of Westminster, 1931.<sup>151</sup> In any case, by virtue of section 91(24) of the Constitution Act, 1867, the Federal Parliament alone is competent to extinguish aboriginal title.<sup>152</sup> Since the enactment of section 35 of the Constitution Act, 1982,<sup>153</sup> the federal power to expropriate aboriginal lands is defunct, except perhaps in cases of necessity.

#### (d) *Act of state*

In the early days of colonization, the Crown sometimes conquered aboriginal territories in the course of war. In British law, the property rights of a conquered people are presumed to continue undisturbed, in the absence of some definite act of expropriation by the Crown performed in the course of acquisition.<sup>154</sup> On the occasions when the Crown actually conquered a native American group, it seems normally to have

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<sup>146</sup> In *Calder*, *supra*, footnote 10, at pp. 401-404 (S.C.R.), 208-210 (D.L.R.), Hall J. at one point states that legislation must be "specific", and later that the intention to extinguish must be "clear and plain". In the *Baker Lake* case, *supra*, footnote 16, at pp. 566-569, Mahoney J. holds that a clear intention may be inferred from the necessary effects of legislation. As for the origins of the requirement, LaForest J.A. comments in *Paul v. Canadian Pacific Limited*, *supra*, footnote 91, at p. 33: "This appears to be a special application of the general presumption that the Legislature does not, in the absence of clear words, intend to interfere with vested rights. . ." The rule that statutes relating to Indians should be liberally construed in their favour was laid down by the Supreme Court of Canada in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36, (1983), 144 D.L.R. (3d) 193, at p. 198.

<sup>147</sup> See text, *supra*, at footnotes 90-104.

<sup>148</sup> See text, *supra*, at footnotes 70-79.

<sup>149</sup> *Supra*, footnote 3.

<sup>150</sup> *Supra*, footnote 43.

<sup>151</sup> 22 Geo. V, c.4 (U.K.). See discussion below at footnotes 183-187.

<sup>152</sup> See discussion below at footnotes 174-176, 188-221.

<sup>153</sup> *Supra*, footnote 1. See discussion in Slattery, *loc. cit.*, footnote 91, and Slattery, *loc. cit.*, footnote 140.

<sup>154</sup> *Guerin v. The Queen*, *supra*, footnote 4, per Dickson J., at pp. 378 (S.C.R.), 336 (D.L.R.); *Calder v. Attorney-General of British Columbia*, *supra*, footnote 10, per Hall J., at pp. 402-403 (S.C.R.), 208-209 (D.L.R.); *Amodu Tijani v. Secretary, Southern Nigeria*, *supra*, footnote 52; *Oyekan v. Adele*, [1957] 2 All E.R. 785 (P.C.). See discussion and references in Slattery, *op. cit.*, footnote 19, pp. 45-62.

left them in the possession of their lands. However, at times, lands may have been seized as an act of state and placed at the disposal of the colony.

Of course, conquest ceased to operate as a possible mode of acquiring aboriginal lands once the Crown gained sovereignty over the native peoples in question. As subjects of the Crown, such peoples would henceforth be entitled to its protection. Their lands could not be seized by executive act, without authorizing legislation.<sup>155</sup>

(e) *Crown grant*

At common law, a Crown grant of land burdened by aboriginal title will not extinguish it, but will take effect subject to the title or else be void.<sup>156</sup> This rule applies to the Federal and Provincial Crowns, and also to the Imperial Crown and local colonial governments before Confederation.

A Crown grant authorized by legislation is in a different position. Its effect on existing aboriginal rights is determined by a number of factors, including the constitutional powers of the legislature in question, the wording of the legislation, and the terms of the grant. But there is a strong presumption against the extinguishment of aboriginal title without native consent, which is displaced only by clear words or necessary intentment.<sup>157</sup>

(f) *Adverse possession*

It might be thought that lands subject to aboriginal title could be acquired by adverse possession, in situations where private individuals have occupied such lands for long periods of time. But, as seen earlier, the land systems introduced into the American colonies were founded on the principle that settlers could gain title to land only by grant from the Crown. Title to ungranted land could not be obtained at common law either by settling on it or buying it from the Indians, and the Proclamation of 1763<sup>158</sup> reflects the common law on this point.

The rule may have harsh consequences in particular cases. Take the position of a private individual who himself and through his predecessors has been in possession of aboriginal lands continuously for over a century. Let us suppose his possession is not tainted by fraud, secrecy, permission, or force, and that throughout this period the original native

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<sup>155</sup> The technical reason is that there can be no act of state between the Crown and its subjects on British territory; see Slattery, *ibid.*, pp. 46-48.

<sup>156</sup> See text, *supra*, at footnotes 70-79.

<sup>157</sup> See text, *supra*, at footnote 146.

<sup>158</sup> *Supra*, footnote 3. See text above at footnotes 52-54. The question whether title to Indian lands may be gained by adverse possession under statutory provisions governing the limitation of actions is a distinct matter.

possessors were capable in law and fact of taking action to eject the squatters but failed, until now, to do so. It can be argued that in such circumstances the adverse possessor must surely be capable at common law of defeating the claim of the aboriginal group. Whatever the force of this argument, it is hard to see how it can be accepted without undermining the premises upon which the land systems of the colonies were constructed.

If, however, one accepts the view that private individuals may acquire title to aboriginal lands by long periods of adverse possession, aboriginal peoples dispossessed in this manner arguably would be entitled to receive monetary compensation for their loss where the dispossession took place with the support of a governmental authority. Take, for example, a situation where a settler took possession of native lands under a Crown grant that in law did not extinguish the aboriginal title of the native occupants, who nevertheless were sufficiently intimidated to move off the land. In such a case, the government involved or its successor would have the legal duty to compensate the native people, on the argument that a *de facto* expropriation of this kind is governed by the same presumption requiring compensation as a statutory expropriation.<sup>159</sup>

(g) *Act of the French Crown*

It could be argued that territories acquired by the British Crown by cession or conquest from France did not form part of the Indian Territories and, with a few exceptions, were not burdened with aboriginal title or any other form of native land rights. This argument maintains that the French Crown never generally recognized the existence of native land rights in the territories it claimed, or alternately that it extinguished such rights in the process of colonization. The only exceptions, on this view, were a few small tracts of land specifically set aside by French authorities for Indian use.<sup>160</sup>

Two sorts of responses may be made to such arguments. First, it can be argued that the French did not in fact claim full title to lands occupied by Indian nations within the asserted boundaries of New France.<sup>161</sup> Such a claim would have been imprudent, because the security and welfare of the French colony depended on good relations with the native peoples. In any case, the number of French settlers was small, and little

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<sup>159</sup> See text, *supra*, at footnotes 90-104.

<sup>160</sup> See, for example, H. Brun, *Les droits des Indiens sur le territoire du Québec* (1969), 10 C. de D. 415, pp. 428-430.

<sup>161</sup> For detailed analysis of the relevant documents, see: Slattery, *op. cit.*, footnote 19, pp. 70-94; B. Slattery, *Did France Claim Canada upon Discovery?*, in J.M. Bumsted (ed.), *Interpreting Canada's Past* (1986), Vol. I, pp. 2-26, originally published in (1978), 59 Can. Hist. Rev. 139. See also W.J. Eccles, *Sovereignty—Association, 1500-1783* (1984), 65 Can. Hist. Rev. 475.

land was needed to accommodate them. Much of the land settled by the French in the St. Lawrence Valley seems to have been unoccupied at the time of settlement.

Second, it can be argued that in areas that the British crown acquired by conquest or cession from France, the doctrine of aboriginal rights applied as fully as it did in areas that Britain claimed as a matter of original right. The status of lands in a conquered or ceded territory such as Acadia or Canada is governed by colonial law, which incorporates the doctrine of aboriginal rights.<sup>162</sup> Under British colonial law, the lands gained from France presumptively belonged to the Indian Territories, in the absence of some act converting them to General Lands.

Regardless of the position at common law, the salient provisions of the Royal Proclamation of 1763<sup>163</sup> applied to the lands acquired from the French Crown, both in Acadia and Canada, and these provisions constitute an official recognition by the British Crown of the existence of subsisting aboriginal land rights to unceded Indian lands within the territories formerly claimed by France.<sup>164</sup>

## (2) *Loss of Aboriginal Title Within The Indian Territories*

We have seen that the Indian Territories make up an area where aboriginal title is gained by appropriation and maintained by possession. It follows that aboriginal title may be lost when a native group voluntarily leaves its lands and moves elsewhere. However, in such a case, the group's title will lapse only after a sufficient time has passed to indicate that the group has irrevocably cut its links with the lands, and taken up permanent residence elsewhere. How long a time this takes depends on the circumstances. It seems unlikely that a native group would lose title to its former lands more rapidly than it could acquire title to its new lands.

When aboriginal title to lands in the Indian Territories is extinguished by abandonment, the lands revert to the common pool of lands available for native use, and may be appropriated in future by other native groups. In other words, the lands do not become General Lands, but remain part of the Indian Territories.

## IV. *Aboriginal Lands and Indian Reserves*

As we have seen, at an early stage of colonial settlement, the categories of Indian Territories and General Lands were supplemented by a third:

<sup>162</sup> See text, *supra*, at footnotes 31-33.

<sup>163</sup> *Supra*, footnote 3.

<sup>164</sup> See *Adams v. R.*, [1985] 4 C.N.L.R. 39 (Que. S.C.), [1985] 4 C.N.L.R. 123 (Que. C.S.P.), and detailed discussion in Slaterry, *op. cit.*, footnote 19, esp. pp. 165-174, 217-227, 244-247, 261-267. Cf. Brun, *loc. cit.*, footnote 160, at pp. 440-450. For analysis of the Proclamation of 1763, see text, *infra*, at footnotes 172-173, 183-187.

"Indian Reserves".<sup>165</sup> An Indian Reserve is land that has become permanently attached to a particular group of native people under a legal regime similar to that of aboriginal title. Unlike lands in the Indian Territories, a Reserve cannot be lost by non-occupation or gained by another group simply by appropriation. On the other hand, a Reserve is not governed by the land regime applying to General Lands but by a special body of rules.

Indian Reserves can be classified along various lines. For our purposes, there are two types. In the first type of reserve, the group's title can be traced back to its title to aboriginal lands in the Indian Territories. Title to such a Reserve is thus a derivative form of aboriginal title. In the second type of Reserve, the group's title stems from a statutory provision, Crown Grant, or other similar instrument, and not from aboriginal title at common law. We will call the first type, "Aboriginal Reserves", and the second, "Granted Reserves".

### A. *Aboriginal Reserves*

Reserves of this type are remarkably diverse, and are often overlaid with so thick a veneer of history that they are not immediately recognizable. Some comprise small pockets of land that were retained by a native group when they ceded the rest their aboriginal territories to the Crown.<sup>166</sup> So long as the lands were not included in the cession (as distinct from lands that were surrendered to the Crown and then granted back to the Indians as Reserves), the group's title to them will continue to rest on the common law, although the treaty may, of course, confirm it. Reserves carved by unilateral governmental act out of a group's unsurrendered ancestral lands are in the same position, unless the constituent act extinguishes the group's aboriginal title.<sup>167</sup> It seems arguable that Reserves may also emerge by more gradual and informal processes, as when aboriginal lands occupied by a particular group come to be surrounded by General Lands, and acquire definite boundaries and strong historical ties with the group in question.<sup>168</sup>

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<sup>165</sup> See text above at footnote 55. For a survey, see R.H. Bartlett, *Reserve Lands*, in Morse, *op. cit.*, footnote 6, pp. 467-578.

<sup>166</sup> See, for example, the Robinson Huron Treaty of 1850, where the Indians cede to the Crown their rights to a designated territory "save and except the reservations set forth in the schedule hereunto annexed"; Morris, *op. cit.*, footnote 27, p. 305.

<sup>167</sup> Thus, in the *Guerin* case, *supra*, footnote 4, Dickson J., after stating that the Indian interest in a reserve was the same as in traditional tribal lands, went on to remark, at pp. 379 (S.C.R.), 337 (D.L.R.): "It is worth noting. . . that the reserve in question here was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation."

<sup>168</sup> An example may be the St. Regis Reserve, the history of which is discussed in *R. v. Adams*, *supra*, footnote 164.

## B. *Granted Reserves*

Other Reserves are held by virtue of a Crown act or statute, and not under the common law doctrine of aboriginal title. Some, for example, owe their origins to grants to Indian nations dislocated as the result of war, as with the lands set aside after the American Revolution for Iroquois Loyalists in southern Ontario,<sup>169</sup> and the lands granted to the Hurons in Quebec during the French regime.<sup>170</sup> Other Reserves were created by the Crown out of lands ceded to it by Indian treaty. These differ (at least notionally) from tracts *excepted* from a surrender since the Indians' right to such a tract arguably depends on the treaty or other act creating the reserve, rather than the common law.

The fact that Granted Reserves owe their existence to particular provisions that differ in wording and status clearly allows for the possibility that such Reserves lack a uniform legal character. Nevertheless, we are bound to take account of an authoritative and long-standing judicial holding, reaffirmed by the Supreme Court in *Guerin*, that title to Indian Reserves of all sorts is identical to aboriginal title.<sup>171</sup> On this view, there is no significant legal difference between Aboriginal Reserves and Granted Reserves, or between Reserve title and aboriginal title.

This holding is obviously apt as regards Aboriginal Reserves, since title to these Reserves originates in aboriginal title. But it is less clearly applicable to Granted Reserves. While it is arguable that the Crown under the prerogative cannot create reserves that depart substantially from the aboriginal model, it seems unlikely that a legislature would be incapable of doing so. The judicial holding is perhaps best understood, then, as laying down a *presumption* of uniformity. On this view, title to Granted Reserves is presumptively the same as title to Aboriginal Reserves and aboriginal title generally, in the absence of wording in the governing act that signals a clear departure from the normal model.

It is submitted, however, that in one respect Reserve title presumptively differs from aboriginal title in its pure form. Whereas in the Indian Territories aboriginal title is founded on appropriation and maintained by possession, title to a Reserve is permanently vested in a particular group, and cannot be lost simply by non-occupation or gained by another group by appropriation.

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<sup>169</sup> See the account in R.J. Surtees, *Indian Land Surrenders in Ontario, 1763-1867* (Research Branch, Indian and Northern Affairs Canada, 1984), pp. 19-26.

<sup>170</sup> See the account of the foundation of the reserve at Lorette in G.F.G. Stanley, *The First Indian 'Reserves' in Canada* (1950), 4 Rev. d'Histoire de l'Amérique Française 178, at pp. 191-195. For discussion of the legal status of Quebec reserves, see R.H. Bartlett, *Indian Reserves in Quebec* (U. of Sask. Native Law Centre: 1984).

<sup>171</sup> Per Dickson J., *supra*, footnote 4, at pp. 379 (S.C.R.), 336-337 (D.L.R.), reaffirming the holding in *Attorney-General for Quebec v. Attorney-General for Canada*, *supra*, footnote 82. The holding has attracted its share of criticism. For a recent

### C. *Statutory Classifications of Native Lands*

It remains to explain how this common law classification of native lands relates to such statutory schemes as the Royal Proclamation of 1763, the Constitution Act, 1867, and the federal Indian Acts.

The Royal Proclamation of 1763 refers to several overlapping categories of native lands.<sup>172</sup> The first is described in the preamble to the Indian Part, where the King affirms that the Indian nations who live under British protection "should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds". This passage treats as reserved for Indians all those parts of the Crown's dominions in America that the Indians have not ceded or sold to the Crown. The description is broad enough to cover both the Indian Territories and Aboriginal Reserves. However, strictly interpreted, it might not include certain Granted Reserves: those created out of Indian lands that had already been ceded to the Crown.

Later, the Proclamation refers to a broader category of Indian lands. It states that no private person shall make any purchases "of any Lands reserved to the said Indians", and provides that such lands can only be purchased by the colonial governments. This provision refers to any lands whatever that are reserved to the Indians, and so covers not only the Indian Territories and Aboriginal Reserves, but also Granted Reserves.

The third category described in the Proclamation is what may be called "the Indian Country". This category has attracted a lot of academic and judicial attention, apparently on the assumption that it is still relevant today. In fact, the category was overtaken by historical events in the decade following the Proclamation's appearance and has less legal interest than the two categories considered above. The Proclamation creates a temporary pool of lands lying west of the main settled areas that is closed to settlement and official purchases for the time being. The Country is defined negatively as all British Territories lying west of the Appalachian Mountains that are not included within the colonial boundaries of Quebec, East and West Florida, and Rupert's Land (the territories granted to the Hudson's Bay Company). The intention was to prevent any purchases of Indian lands from taking place in this area for the time being (even purchases by colonial governments), and thus to halt the spread of white settlement into the American interior. But the Proclamation's wording makes it clear that the provision was a temporary expedient, and in fact the eastern boundaries of the Indian Country were rede-

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example, see H. Brun, *La possession et la réglementation des droits miniers, forestiers et de réversion dans les réserves indiennes du Québec* (1985), 30 McGill L.J. 415.

<sup>172</sup> *Supra*, footnote 3. For detailed discussion, see Slattery, *op. cit.*, footnote 19, pp. 191-282.

fined and substantially altered in a series of treaties negotiated with various Indian nations over the next decade, with the Crown's approval.<sup>173</sup>

The Indian Country is a creature of the Proclamation, and does not reflect the common law categories considered above. The Country clearly does not include all the lands in the Indian Territories. Large parts of Quebec and Rupert's Land, for example, were still part of the Indian Territories, yet they are excluded from the Country as defined. Nor does it include most of the Aboriginal and Granted Reserves existing at that period. For most purposes, the Indian Country is of little interest today. The continuing relevance of the Proclamation of 1763 lies in the general provisions dealing with Indian lands, which in essence closely follow the tenets of the common law doctrine of aboriginal title.

Section 91(24) of the Constitution Act, 1867<sup>174</sup> gives the federal Parliament exclusive jurisdiction over "Indians and Lands reserved for the Indians". The phrase likely covers all lands reserved for aboriginal peoples, whether Indian, Inuit, or Metis.<sup>175</sup> The important question is how broadly the term "reserved" should be interpreted.

In the *St. Catherine's* case,<sup>176</sup> the Privy Council considered the argument that section 91(24) does not cover land occupied by virtue of the Proclamation of 1763, but only tracts set aside for Indians after the Proclamation was issued. The Committee rejected this argument, observing that the words used in the section "are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation". They continued: "It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority."<sup>177</sup> These observations strongly suggest that section 91(24) covers native lands generally, both those in the Indian Territories as well as Aboriginal and Granted Reserves. This conclusion follows directly from the holding that Proclamation lands are within the section's scope, for, as we have just seen, all forms of native lands are covered by one or other of the Proclamation's provisions.

Greater uncertainty surrounds another statutory class of native lands. In the various Indian Acts passed since Confederation, Parliament has

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<sup>173</sup> See, for example, L. De Vorsey, *The Indian Boundary in the Southern Colonies, 1763-1775* (1966).

<sup>174</sup> *Supra*, footnote 43.

<sup>175</sup> The term "Indians" has been held to include the Inuit or Eskimo peoples, and it probably also covers some people of mixed blood, such as the Metis. See: *Re Term "Indians"*, [1939] S.C.R. 104; C. Chartier, "Indian": An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867 (1978-79), 43 Sask. L. Rev. 37; P.W. Hogg, *Constitutional Law of Canada* (2nd ed., 1985), pp. 552-553.

<sup>176</sup> *Supra*, footnote 52.

<sup>177</sup> *Ibid.*, at p. 59.



singled out for special treatment a category of lands usually described as "reserves".<sup>178</sup> The term is defined in slightly different ways in the various Acts. The current Act states that "reserve" means "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band".<sup>179</sup> If this definition is read in the light of the Proclamation of 1763 and the Privy Council's remarks in *St. Catherine's*, it arguably extends not just to granted lands but to aboriginal lands generally. The common assumption, however, is that a narrower class of lands is designated, although how that class should be identified is problematical. There is every reason to think that the definition is not confined to granted lands and that at least certain types of lands held under aboriginal title are covered, notably what we have called Aboriginal Reserves.<sup>180</sup> Whether coverage extends beyond such Reserves to aboriginal lands generally is an open question.

#### V. Legislative Authority over Aboriginal Rights

Aboriginal rights have clearly been affected over the years by legislation,<sup>181</sup> but the extent of the inroads is uncertain. The matter is complicated by the provisions of several important constitutional documents, including the Royal Proclamation of 1763, the Constitution Act, 1867, and the Constitution Act, 1982, which shield aboriginal rights from legislative intrusion.<sup>182</sup>

It can be argued, for instance, that the Indian provisions of the Royal Proclamation of 1763<sup>183</sup> could not be repealed by Canadian legislatures prior to 1931, but only by the Imperial Parliament. This proposition rests on judicial holdings that the Proclamation was an act of the Imperial Crown equivalent in force and effect to an Act of Parliament.<sup>184</sup>

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<sup>178</sup> See generally R.H. Bartlett, *The Indian Act of Canada* (University of Saskatchewan Native Law Centre, 1980); first published in (1977-78), 27 *Buf. Law Rev.* 581.

<sup>179</sup> *Indian Act*, *supra*, footnote 112, s. 2(1).

<sup>180</sup> In *R. v. Lady McMaster*, [1926] Ex. C.R. 68, the court proceeded on the basis that the Indian lands in question were Proclamation lands (at pp. 69, 73), and also held, at p. 75, that the lands were covered by certain provisions of the Indian Act. See also: *R. v. Easterbrook*, [1929] Ex. C.R. 28, *aff'd*. [1931] S.C.R. 210; *St. Catharines Milling and Lumber Co. v. The Queen*, *supra*, footnote 52, at pp. 636-637, per Strong J.

<sup>181</sup> See text, *supra*, at footnotes 45-47.

<sup>182</sup> These are the most general of the relevant instruments. But some parts of Canada are governed by particular constitutional instruments of equal importance. See, for example, the excellent discussion of the constitutional terms governing the transfer of Rupert's Land and the North-Western Territory to Canada, in K. McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (U. of Sask. Native Law Centre: 1982). See, generally, Cumming and Mickenberg, *op. cit.*, footnote 8.

<sup>183</sup> *Supra*, footnote 3.

<sup>184</sup> *R. v. Lady McMaster*, *supra*, footnote 180, at pp. 72-73; *Easterbrook v. R.*, [1931] S.C.R. 210, at pp. 214-215, 217-218, affirming [1929] Ex. C.R. 28, at pp.

As such, it arguably had the effect of an Imperial statute and was paramount to local statutes under the Colonial Laws Validity Act, 1865.<sup>185</sup> If this is correct, pre-Confederation colonial legislation must be read subject to the Proclamation's terms. The same may hold true of statutes passed by the Canadian Parliament and provincial legislatures prior to the Statute of Westminster,<sup>186</sup> which in 1931 released Canada from any imperial bonds other than those embodied in the Constitution Acts.<sup>187</sup>

A second issue relates to the distribution of powers between federal and provincial legislatures under the Constitution Act, 1867,<sup>188</sup> section 91(24) of which gives the Canadian Parliament exclusive authority over "Indians, and Lands reserved for the Indians". Aboriginal rights are intimately connected with the special status and capacities of Indian peoples and the possession and use of their lands.<sup>189</sup> It seems probable, then, that they form an intrinsic part of the subject-matters covered by section 91(24). On this view, the federal Parliament has the exclusive power to deal with aboriginal rights, and, subject to the possible constitutional limitations mentioned above, it may exercise that power so as to regulate or extinguish the rights in question.<sup>190</sup>

Under general constitutional principles, the provinces cannot legislate in relation to subject-matters falling within exclusive federal juris-

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29-30; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), per Norris J.A., at pp. 636, 644; *R. v. Isaac*, *supra*, footnote 71, per MacKeigan C.J., at p. 478, per Cooper J.A., at p. 496; *Calder v. Attorney General of British Columbia*, *supra*, footnote 10, per Hall J., at pp. 394-395 (S.C.R.), 203 (D.L.R.). The Proclamation's validity and legal effects are considered in Slattery, *op. cit.*, footnote 19, pp. 283-313.

<sup>185</sup> *R. v. White and Bob*, *ibid.*, per Norris J.A., at p. 662; *R. v. Isaac*, *supra*, footnote 71, per MacKeigan C.J., at p. 485; *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All E.R. 118 (C.A.), per Lord Denning M.R., at pp. 124, 125. The arguments *pro* and *con* are discussed in Slattery, *op. cit.*, footnote 19, pp. 315-319.

<sup>186</sup> *Supra*, footnote 151.

<sup>187</sup> See Hogg, *op. cit.*, footnote 175, pp. 40-42; Slattery, *loc. cit.*, footnote 31, at pp. 393-396.

<sup>188</sup> *Supra*, footnote 43. See generally, Lysyk, *loc. cit.*, footnote 57; K.M. Lysyk, Constitutional Developments Relating to Indians and Indian Lands: An Overview, in Law Society of Upper Canada Special Lectures, The Constitution and the Future of Canada (1978), pp. 201-228; Hogg, *op. cit.*, footnote 175, pp. 551-562; K. McNeil, Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada (University of Saskatchewan Native Law Centre: 1983); N. Lyon, Constitutional Issues in Native Law, in Morse, *op. cit.*, footnote 6, pp. 408-451; D. Sanders, The Application of Provincial Laws, in Morse, *ibid.*, pp. 452-466; P. Hughes, Indians and Lands Reserved for the Indians: Off-Limits to the Provinces? (1983), 21 Osg. Hall Law J. 82.

<sup>189</sup> The requirement of a close connection with Indian status or rights is articulated by Beetz J. in *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, at pp. 1047-1048, (1979), 102 D.L.R. (3d) 385, at p. 397.

<sup>190</sup> *R. v. Derriksan*, *supra*, footnote 45; *Kruger and Manuel v. The Queen*, *supra*, footnote 45, at pp. 116 (S.C.R.), 443 (D.L.R.).

diction. Thus, provincial laws that single out Indians and Indian lands for special treatment are invalid.<sup>191</sup> This does not mean, however, that these subjects are immune to provincial power. Provincial laws of general application may apply to them in aspects falling within provincial jurisdiction.<sup>192</sup> It is clear, for example, that provincial traffic laws govern Indians driving on a public road, and that the laws of contract apply to Indians shopping in a normal drug-store.

Nevertheless, there is a point at which provincial laws of general application intrude into federal jurisdiction. That point is reached where the laws affect matters that are integral to the federal heads of power.<sup>193</sup> Provincial laws of general application that impair the particular status, capacities, or rights of Indians *qua* Indians,<sup>194</sup> that affect the possession and use of Indian lands,<sup>195</sup> or that abrogate or qualify Indian treaty rights<sup>196</sup> are invalid or must be read down so as not to affect the federal matters in question.<sup>197</sup> Aboriginal rights lie at the core of rights held by Indians *qua* Indians. In many instances, they are intimately connected with the use of Indian lands, as with aboriginal title and hunting and fishing rights. In other cases, they are recognized or defined in treaties with the

<sup>191</sup> *R. v. Sutherland*, [1980] 2 S.C.R. 451, at pp. 455-456, (1980), 113 D.L.R. (3d) 374, at pp. 378-379; *Dick v. The Queen*, *supra*, footnote 57, at pp. 322-323 (S.C.R.), 56-57 (D.L.R.).

<sup>192</sup> *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695, at p. 703, (1973), 40 D.L.R. (3d) 553, at pp. 559-560.

<sup>193</sup> *Four B Manufacturing Ltd. v. United Garment Workers*, *supra*, footnote 189, per Beetz J., at pp. 1047 (S.C.R.), 396-397 (D.L.R.).

<sup>194</sup> *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, (1975), 60 D.L.R. (3d) 148, per Laskin C.J., at pp. 760-763 (S.C.R.), 154-156 (D.L.R.), per Martland J., at pp. 775 (S.C.R.), 165-166 (D.L.R.), per Ritchie J., at pp. 777 (S.C.R.), 167 (D.L.R.); *Four B Manufacturing Ltd. v. United Garment Workers*, *supra*, footnote 191, per Beetz J., at pp. 1047-1048 (S.C.R.), 397 (D.L.R.); *Dick v. The Queen*, *supra*, footnote 57, at pp. 315-321, 325-326 (S.C.R.), 51-55, 59 (D.L.R.).

<sup>195</sup> The leading case is *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at pp. 295-296, (1986), 26 D.L.R. (4th) 175, at pp. 183-184. For earlier authorities, see, *R. v. Jim* (1915), 26 C.C.C. 236 (B.C.S.C.); *R. v. Rodgers*, [1923] 3 D.L.R. 414 (Man. C.A.); *Corporation of Surrey v. Peace Arch Enterprises* (1970), 74 W.W.R. 380 (B.C.C.A.); *Cardinal v. Attorney General of Alberta*, *supra*, footnote 192, per Martland J., at pp. 704-708 (S.C.R.), 560-563 (D.L.R.); *Millbrook Indian Band v. Northern Counties Residential Tenancies Board* (1978), 84 D.L.R. (3d) 174 (N.S.S.C.); *Western Industrial Contractors Ltd. v. Sarcee Developments Ltd.* (1979), 98 D.L.R. (3d) 424, at pp. 428-429, 435-436 (Alta. A.D.); *The Queen v. Smith* (1980), 113 D.L.R. (3d) 522, at pp. 571-572 (F.C.A.); *Re Stony Plain Indian Reserve No. 135* (1981), 130 D.L.R. (3d) 636, at p. 654 (Alta. C.A.).

<sup>196</sup> *R. v. White and Bob*, *supra*, footnote 184, per Davey J.A., at p. 618; approved in *Kruger and Manuel v. The Queen*, *supra*, footnote 45, at pp. 113 (S.C.R.), 440 (D.L.R.), and *Simon v. The Queen*, *supra*, footnote 15, at pp. 441 (S.C.R.), 410 (D.L.R.).

<sup>197</sup> See discussion in *Dick v. The Queen*, *supra*, footnote 57, at pp. 332 (S.C.R.), 56 (D.L.R.).

Crown. There is thus a strong argument for the view that aboriginal rights cannot be impaired by provincial laws of general application.<sup>198</sup>

The same result flows from the doctrine of federal paramountcy.<sup>199</sup> This doctrine holds that, where there is a conflict between otherwise valid federal laws and provincial laws affecting federal subject-matters such as Indians and Indian lands, the federal laws will prevail.<sup>200</sup> The common law rules governing aboriginal rights are arguably federal laws for these purposes, and the same holds true of the Royal Proclamation of 1763. These two points will be considered separately.

It has been held that common law rules falling within the jurisdiction of the Canadian Parliament are paramount to provincial laws. This was the burden of the Supreme Court's ruling in *Bisaillon v. Keable*,<sup>201</sup> where Beetz J., speaking for the court, stated: "... I do not see why the federal Parliament is under an obligation to codify legal rules if it wishes to ensure that they have paramountcy over provincial laws, at least when some of those legal rules fall under its exclusive jurisdiction. . .". On this view, provincial statutes inconsistent with the common law rules governing aboriginal rights are ineffective even when they would otherwise be valid under the constitutional division of powers.<sup>202</sup>

Pre-Confederation acts that fall within federal jurisdiction are also federal laws for purposes of the paramountcy rule. This conclusion flows

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<sup>198</sup> The Supreme Court has not yet decided whether provincial laws of general application may affect aboriginal rights *ex proprio vigore* and apart from the effect of section 88 of the Indian Act, considered below. The major appeals to the Supreme Court on the application of provincial laws to Indian hunting rights have been argued and decided apart from the question of aboriginal rights and title; see *Kruger and Manuel v. The Queen*, *supra*, footnote 45, at pp. 108-109 (S.C.R.), 437 (D.L.R.); *Dick v. The Queen*, *supra*, footnote 57, at pp. 315 (S.C.R.), 51 (D.L.R.). In *Cardinal v. Attorney General of Alberta*, *supra*, footnote 192, at pp. 706-707 (S.C.R.), 562 (D.L.R.), Martland J. expressed the opinion that a provincial game law of general application would not relate to Indians *qua* Indians and so would apply to Indians hunting outside a reserve. But the decision turned on the wording of the Alberta Natural Resources Transfer Agreement, and aboriginal hunting rights were not at issue. By contrast, in *Dick v. The Queen*, *ibid.*, pp. 320 (S.C.R.), 55 (D.L.R.), Beetz J. noted that there was considerable evidence capable of supporting the conclusion that provincial legislation restricting hunting did in fact impair the Indianness of the Band in question there, and adopted that assumption for the purposes of the decision.

<sup>199</sup> See, generally, Hogg, *op. cit.*, footnote 175, Chap. 16.

<sup>200</sup> *Four B Manufacturing Ltd. v. United Garment Workers of America*, *supra*, footnote 189, per Beetz J., at pp. 1048-1049 (S.C.R.), 398 (D.L.R.).

<sup>201</sup> [1983] 2 S.C.R. 60, at p. 108, (1983), 2 D.L.R. (4th) 193, at p. 232.

<sup>202</sup> See discussion in *R. v. Isaac*, *supra*, footnote 71, per MacKeigan C.J., at p. 469. The point must be distinguished from the argument, discussed in *Dick v. The Queen*, *supra*, footnote 57, that provincial laws of general application that have the effect of limiting certain aboriginal rights are invalid insofar as they affect Indians as Indians, because they intrude into an area of exclusive federal jurisdiction. The latter

from section 129 of the Constitution Act, 1867,<sup>203</sup> which provides that laws in effect in the uniting colonies shall continue in effect after Confederation, subject to alteration or repeal by the legislature empowered to deal with the subject-matter in question. So, where the subject-matter of a pre-Confederation law falls under federal jurisdiction, Parliament alone can repeal or amend it.<sup>204</sup> It follows that such a law is paramount to provincial laws that are inconsistent with its terms. Otherwise a province would effectively be able to amend or repeal a pre-Confederation law falling within federal jurisdiction. As seen above, the Canadian Parliament has the exclusive power to repeal the Indian provisions of the Proclamation of 1763, under section 91(24) of the Constitution Act, 1867.<sup>205</sup> Therefore, the Proclamation takes precedence over conflicting provincial laws.

This, then, is the general scheme that results from the division of powers under the Constitution Act, 1867. However, the operation of the scheme is significantly affected by section 88 of the federal Indian Act,<sup>206</sup> which provides:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

This section gives force to provincial laws of general application that would otherwise be invalid in their application to Indians.<sup>207</sup> It achieves this result by incorporating them into federal law. The laws incorporated are subordinated to the terms of "any treaty", "any other Act of the Parliament of Canada", and the provisions of the Indian Act and its attendant legislation. The section does not refer to the common law rules governing aboriginal rights. It follows that these rules can be overridden by provincial statutes adopted as federal law.<sup>208</sup> This conclusion, however, is subject to several important qualifications.

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argument does not assert the existence of a federal law paramount to the provincial statutes in question, and so differs from the point made here.

<sup>203</sup> *Supra*, footnote 43. See *Hellens v. Densmore*, [1957] S.C.R. 768, at p. 784 (1957), 10 D.L.R. (2d) 561, at p. 569; *Re Broddy* (1982), 142 D.L.R. (3d) 151 (Alta. C.A.); *R. v. Isaac*, *supra*, footnote 71, per MacKeigan C.J., at p. 468.

<sup>204</sup> *Dobie v. The Temporalities Board* (1882), 7 A.C. 136 (P.C.). For discussion and further references, see A.H.F. Lefroy, *The Law of Legislative Power in Canada* (1897-98), pp. 365-371; A.H.F. Lefroy, *Canada's Federal System* (1913), pp. 161-163.

<sup>205</sup> See text, *supra*, at footnotes 174-177.

<sup>206</sup> *Supra*, footnote 112.

<sup>207</sup> *Dick v. The Queen*, *supra*, footnote 57.

<sup>208</sup> *Kruger and Manuel v. The Queen*, *supra*, footnote 45, at pp. 115-117 (S.C.R.), 442-443 (D.L.R.).

The first stems from the Royal Proclamation of 1763.<sup>209</sup> Section 88 refers to “any *treaty* and any *other* Act of the Parliament of Canada”. The word “other” is significant, for it indicates that the phrase “Act of Parliament” is used in a sense broad enough to include treaties. Yet most Indian treaties were Crown acts that were never approved or ratified by the Canadian Parliament. And it has never been thought that an Indian treaty must be ratified by Parliament to meet the section’s requirements. Second, it is clear that Indian treaties signed by the Crown before Confederation are covered by the section, even though they obviously cannot be viewed as “other” acts of a Parliament not yet in existence.<sup>210</sup> It seems possible, then, that the phrase “Act of the Parliament of Canada” does not refer exclusively to laws *passed* by Parliament but includes all laws and acts in force in Canada that are *subject to repeal* by Parliament, including Crown acts prior to Confederation.<sup>211</sup> On this view, the Proclamation of 1763 qualifies for the section’s protection. The question has yet to be decided by the Supreme Court. Nevertheless, lower courts have held that the Proclamation is not a treaty or act of Parliament saved by the section.<sup>212</sup>

The second qualification is founded on the fact that section 88 makes provincial laws applicable to “Indians” but does not refer to “lands reserved for the Indians”. Section 91(24) of the Constitution Act, 1867 gives Parliament jurisdiction over both subject-matters, and the Supreme Court has held that they are two distinct heads of power.<sup>213</sup> It follows that section 88 does not referentially incorporate provincial laws that affect the possession and use of lands reserved for Indians.<sup>214</sup> This interpreta-

<sup>209</sup> *Supra*, footnote 3.

<sup>210</sup> *R. v. White and Bob*, *supra*, footnote 184 (affirmed on appeal, [1956] S.C.R. vi, (1965), 52 D.L.R. (2d) 481n); *Simon v. The Queen*, *supra*, footnote 15, at pp. 408-410 (S.C.R.), 407-409 (D.L.R.).

<sup>211</sup> The courts have given a similarly broad interpretation to the phrase “laws of general application from time to time in force in any province”, stating that it includes not only laws passed by provincial legislatures but also any laws that form part of provincial law, such as laws of England received into the province; *The Queen v. George*, [1966] S.C.R. 267, at pp. 280-281, (1966), 55 D.L.R. (2d) 386, at p. 398, per Martland J.; *Natural Parents v. Superintendent of Child Welfare*, *supra*, footnote 194, per Laskin C.J.C., at pp. 759 (S.C.R.), 153 (D.L.R.); *Kruger and Manuel v. The Queen*, *supra*, footnote 45, at pp. 109 (S.C.R.), 438 (D.L.R.).

<sup>212</sup> *Kruger and Manuel v. The Queen* (1975), 60 D.L.R. (3d) 144, at p. 147 (B.C.C.A.) (not considered on further appeal to the Supreme Court of Canada, *supra*, footnote 45); *R. v. Tennisco* (1981), 131 D.L.R. (3d) 96 (Ont. H.C.), reversing (1980), [1983] 1 C.N.L.R. 112 (Ont. P.C.); *R. v. Polchies* (1982), 113 A.P.R. 449, at p. 454 (N.B.C.A.).

<sup>213</sup> *Four B Manufacturing Ltd. v. United Garment Workers*, *supra*, footnote 189, at pp. 1040-1050 (S.C.R.), 398-399 (D.L.R.).

<sup>214</sup> *R. v. Johns* (1962), 133 C.C.C. 43, at p. 47 (Sask. C.A.); *R. v. Isaac*, *supra*, footnote 71, per MacKeigan C.J., at p. 474; *Millbrook Indian Band v. Northern Counties Residential Tenancies Board*, *supra*, footnote 195, at pp. 182-183; *The Queen v.*

tion is consistent with the fiduciary responsibility of the federal Crown to protect Indian lands.<sup>215</sup> It also accords with the principle that statutes relating to Indians should be construed liberally and doubtful expressions resolved in their favour.<sup>216</sup>

This limitation on the effect of section 88 is important for several reasons. As noted earlier, the expression "lands reserved for the Indians" includes not only Indian reserves in the narrow sense, but also aboriginal lands recognized by the Royal Proclamation of 1763.<sup>217</sup> Thus, even if the Proclamation is not directly saved by the section, its provisions regarding Indian lands are protected. Second, it appears that aboriginal rights of hunting and fishing may properly be characterized as property rights, which may bring them under the shield of Indian lands.<sup>218</sup>

These conclusions, however, have occasionally been disputed. It has been argued that section 88 provides that *all* provincial laws of general application are applicable to Indians, and it makes no difference whether the laws are in relation to land or some other subject-matter.<sup>219</sup> The argument seems plausible as far as it goes. Thus, lands held by Indians as ordinary citizens are subject to the general laws of the province, so that they must conform for example to local building and health requirements.<sup>220</sup> But it does not follow that section 88 makes provincial laws applicable to the special category of lands reserved for Indians.<sup>221</sup> That conclusion would follow only if such lands did not constitute a distinct constitutional subject-matter, but were simply subsumed under "Indians". As it is, Parliament's power to legislate for Indian lands does not flow from its jurisdiction over Indians. So Parliament's deci-

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*Smith, supra*, footnote 195, at pp. 570-571; *Re Stony Plain Indian Reserve No. 135, supra*, footnote 195, at pp. 653-654; *Derrickson v. Derrickson* (1984), 9 D.L.R. (4th) 204, at p. 208 (B.C.C.A.); Lysyk, *loc. cit.*, footnote 57, at p. 518; Sanders, *loc. cit.*, footnote 188, at p. 456. For a different view, see *Attorney-General of Ontario v. Bear Island Foundation, supra*, footnote 16, at pp. 474-475. The Supreme Court reviewed the issue in *Derrickson v. Derrickson, supra*, footnote 195, at pp. 296-299 (S.C.R.), 185-187 (D.L.R.), but made no ruling on it.

<sup>215</sup> See text, *supra*, at footnotes 105-116.

<sup>216</sup> *Nowegijick v. The Queen, supra*, footnote 146, at pp. 36 (S.C.R.), 198 (D.L.R.).

<sup>217</sup> See text, *supra*, at footnotes 174-177.

<sup>218</sup> See text, *supra*, at footnote 57.

<sup>219</sup> The argument is referred to, without comment, in *Derrickson v. Derrickson, supra*, footnote 195, at pp. 298-299 (S.C.R.), 186-187 (D.L.R.).

<sup>220</sup> *Re Stony Plain Indian Reserve No. 135, supra*, footnote 195, at p. 656.

<sup>221</sup> In *Cardinal v. Attorney General of Alberta, supra*, footnote 192, the Supreme Court held that the following provision of the Alberta Natural Resources Transfer Agreement had the effect of making provincial game laws applicable to Indians even when they were on Indian Reserves: "Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof. . ." However, the reasoning turned on the particular wording and rationale of the clause in question.

sion to make provincial laws of general application applicable to Indians leaves the subject-matter of Indian lands untouched.

Other fundamental issues are posed by section 35(1) of the Constitution Act, 1982, which recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada".<sup>222</sup> It seems clear that this provision entrenches the rights it refers to, so that laws that are inconsistent with its terms are ineffective under section 52. Greater uncertainty surrounds the meaning of the word "existing". Leaving aside treaty rights, which pose separate problems, it appears that the word ensures that aboriginal rights that were validly extinguished before the Constitution Act, 1982 came into effect on 17 April 1982 are not revived by the section. On this view, "existing" means "unextinguished".<sup>223</sup>

What then is the position of aboriginal rights that had not been extinguished prior to 17 April 1982 but were subject at that time to laws that regulated the way in which they could be exercised?<sup>224</sup> Take, for example, an aboriginal hunting right that was governed by statutory regulations limiting the times of hunting, the species that could be hunted, the number of animals that could be taken, and so on. Such regulations would not extinguish the right or permanently abridge it. If they were repealed, the right in question would resume its former shape, just as the right of a property owner to build as he pleases on his property revives once building restrictions are lifted. It follows that the hunting right in question is protected by section 35(1) as an unextinguished aboriginal right. The contentious issue is how far the right is subject to the restrictions in place on 17 April 1982.

There are several possible solutions. The first holds that section 35(1) entrenches the right in the precise form it held on 17 April 1982, subject to the full range of regulations in existence then. This approach

<sup>222</sup> *Supra*, footnote 1. The constitutional provisions are discussed in: Slattery, *loc. cit.*, footnote 91; Slattery, *loc. cit.*, footnote 140; K.M. Lysyk, The Rights and Freedoms of the Aboriginal Peoples of Canada, in W.S. Tarnopolsky and G.-A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms* (1982), pp. 467-488; Hogg, *op. cit.*, footnote 175, Chap. 24; K. McNeil, The Constitutional Rights of the Aboriginal Peoples of Canada (1982), 4 Sup. Ct. L. Rev. 255; D. Sanders, The Rights of the Aboriginal Peoples of Canada (1983), 61 Can. Bar Rev. 314; G. Emery, *Reflexions sur le sens et la portée au Québec des articles 25, 35, et 37 de la Loi constitutionnelle de 1982* (1985), 25 C. de D. 145; J. O'Reilly, *La Loi constitutionnelle de 1982, droit des autochtones* (1984), 25 C. de D. 125. For recent jurisprudence on section 35, see, for example, *R. v. Eninew* (1983), 1 D.L.R. (4th) 595 (Sask. Q.B.), *aff'd.* (1984), 10 D.L.R. (4th) 137 (Sask. C.A.); *R. v. Horse*, [1984] 4 C.N.L.R. 99 (Sask. C.A.); *R. v. Adams*, [1985] 4 C.N.L.R. 123 (Que. C.S.P.), [1985] 4 C.N.L.R. 39 (Que. S.C.); *Sparrow v. R.*, [1987] 2 W.W.R. 577 (B.C.C.A.).

<sup>223</sup> See discussion in Slattery, *loc. cit.*, footnote 140, at pp. 376-387.

<sup>224</sup> Compare the following discussion with the analysis of the British Columbia Court of Appeal in *Sparrow v. R.*, *supra*, footnote 222.



reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.

An alternative approach is to hold that section 35(1) recognizes unextinguished aboriginal rights in their original form, so that any regulations restricting their exercise are invalid. This approach leads to extreme consequences. It suggests, for example, that regulations implementing basic safety precautions in hunting, or protecting a rare species of animal might be invalid. It seems, moreover, inconsistent with the word "existing", which suggests that the rights in question are affirmed in a contemporary form rather than in their primeval simplicity and vigour.

The desirable solution, then, lies between these two extremes. It is submitted that section 35(1) permits a court to uphold certain regulations in existence at the commencement date, while striking down others, and allows legislatures a limited power of regulation in the future. The governing criteria should be worked out on a case by case basis. But, at the least, the following sorts of regulations would be valid: (1) regulations that operate to preserve or advance section 35 rights (as by conserving a natural resource essential to the exercise of such rights); (2) regulations that prevent the exercise of section 35 rights from causing serious harm to the general populace or native peoples themselves (such as standard safety restrictions governing the use of fire-arms in hunting);<sup>225</sup> and (3) regulations that implement state policies of overriding importance to the general welfare (as in times of war or emergency).

### *Conclusion*

From early colonial days, the doctrine of aboriginal rights has formed part of the basic constitutional structure of Canada. It originated in principles of colonial law that defined the relationship between the British Crown and the native peoples of Canada and the status of their lands, laws, and existing political structures. Some of those principles were articulated in the Royal Proclamation of 1763, and were reflected in treaties concluded between the Crown and particular native groups. At Confederation, they passed into the federal sphere, and formed a body of basic common law principles operating across Canada. In principle, these principles were liable to be overridden by legislation. However,

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<sup>225</sup> For analogous holdings in other contexts, see: *Myran v. The Queen*, [1976] 2 S.C.R. 137, (1975), 58 D.L.R. (3d) 1; *R. v. Napoleon*, [1985] 6 W.W.R. 302 (B.C.C.A.).

they were protected in part by the provisions of constitutional instruments such as the Proclamation of 1763, and the Constitution Act, 1867. With the enactment of the Constitution Act in 1982, they have become constitutionally entrenched.

The Constitution Act, 1982 signifies more than a mere mechanical adjustment in the doctrine of aboriginal rights, protecting it henceforth from legislative inroads. It represents a conscious political act whereby the people of an independent Canada reaffirm the values implicit in the doctrine. In 1969, when the government of Canada issued its famous White Paper on Indian policy, it was possible to view aboriginal rights as the embarrassing relics of a half-forgotten colonial past, to be interred as quickly and decently as possible, and certainly not to be taken as the basis for modern governmental policies.<sup>226</sup> The remarkable reaction of native communities across the country to the White Paper demonstrated that what was mere history for some was a matter of life or death for others. So, when section 35 of the Constitution Act, 1982, recognizes and affirms the existing aboriginal rights of the aboriginal peoples of Canada it constitutes a significant step toward the acceptance of the native point of view.

But there is a danger that section 35 can become a legal prison, locking native peoples into historically-based structures that impede them from playing their proper role in modern Canadian society. This danger can be averted only by interpreting the section in the light of the fundamental values that inform it. A full discussion of these matters must be left to another occasion. Briefly, however, it may be suggested that two major considerations lie at the foundation of section 35. First, basic historical commitments made to native peoples should not be lightly overturned, and generally not without their consent. These commitments may at times have been ill-considered, and they may not always have been in the best interests of native peoples themselves. But they are the basis upon which native peoples entered Canadian society, and which gave them a stable foothold in an often difficult struggle to survive. If these commitments are now to be changed, native peoples must be fully involved in the process of renegotiation. Second, native Canadians are not just people who happen to have a heritage differing from that of the majority of Canadians, one more ingredient in the cultural potpourri of modern Canada. In ways that we may not fully recognize or appreciate, native Canadians represent our society's only deep historical links to the land, consolidated over millenia. If their land is now our land as well, their relationship with that land is particularly worthy of understanding and respect.

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<sup>226</sup> See, S. Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968-1970* (1981).